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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NELLO L. TEER COMPANY, *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Nello L. Teer Company petitions for a writ of certiorari to review the decision of the United States Court of Claims in this case, which was entered on July 16, 1965.

OPINION BELOW

The opinion of the Court of Claims (57a-111a)[1] is reported at 348 F. 2d 533. The opinion of the Commissioner of the Court of Claims (24a-56a) is unreported.

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[1] Numbers in parenthesis with an "a" suffix refer to the pages in petitioner's Appendix.

JURISDICTION

The opinion and order of the Court of Claims were entered on July 16, 1965. A timely motion for reconsideration of its judgment filed on August 31, 1965, was denied on October 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. The standard form of Government construction contract contains the following provision relating to wage rates:

> SC 17 (b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

Under this provision, where there is reasonable ground to believe that a classification of workers employable on a construction project has been omitted from the schedule of minimum wage rates listed in the specifications, and there is mutual agreement between the contractor and the labor union representing the class of labor concerned on wage rates which are in conformity with those listed in the wage schedule, whether a dispute resulting from the Contracting Officer's withholding of his approval of employment of workers at such rates is to be resolved in accordance with

the Disputes provisions of the standard form of Government construction contract, or by the *ex parte* declaration of the Department of Labor.

2. If such resolution is to be made by the *ex parte* declaration of the Department of Labor, whether its decision is conclusive and not subject to review by the Court of Claims.

3. Whether Section 5.11 of the Regulations issued by the Secretary of Labor, 29 CFR § 5.11, gives the Secretary of Labor authority to resolve disputes which arise in the course of the performance of work covered by a Government contract as to which classifications of laborers and mechanics are employable on the construction project.

4. If the Secretary of Labor has such authority, whether his decision is conclusive and not subject to review by the Court of Claims.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions and regulations principally involved, the provisions of which are printed in the Appendix (112a-117a), are:

Davis-Bacon Act, 40 USC § 276a

Wunderlich Act, 41 USC §§ 321-322

Regulations, Secretary of Labor

§ 5.6, 29 CFR § 5.6, 16 F.R. 4431-4432

§ 5.11, 29 CFR § 5.11, 16 F.R. 4432

STATEMENT

1. Preliminary Statement

This case raises the questions of whether a dispute arising from a Contracting Officer's decision as to the omission of certain classifications of workers from the wage schedule set forth in the specifications of the construction contract is to be resolved under the Disputes provisions of the standard form of Government construction contract,[2] or by a ruling made, *ex parte*, by an attorney in the office of the Solicitor of the Department of Labor and what standards of review are to be applied by the Court of Claims to any such decision.

At its inception the dispute between petitioner and the Contracting Officer was whether, in fact, there had been omitted from the minimum wages listed in the contract specifications, a classification of workers employable on the project under the labor practices prevailing at the site of the work (88a-90a).

During the trial it was established that the petitioner's contention was correct, that in fact there had been omitted from the listed wage rates a classification for power equipment operators engaged in heavy and highway construction work (59a, 85a, 103a). Notwithstanding this, the issue upon which the Court of Claims focused was whether the omission of this classification of workers from the wage determination prepared by the Secretary of Labor was intentional. The Court concluded, on the basis of the concurrence by an attor-

[2] Questions concerning the scope and finality of administrative decisions under the Disputes provisions of Government construction contracts are now before the Court in *United States* v. *Anthony Grace & Sons, Inc.*, No. 439, cert. granted 34 L.W. 3160, and *United States* v. *Utah Construction & Mining Co.*, No. 440, cert. granted 34 L.W. 3160.

ney in the office of the Solicitor of Labor with the Contracting Officer's earlier decision, that the omission of this classification of workers was intentional, that under *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, the Court of Claims could not review the correctness of the determination, and that the Secretary of Labor had the power not only to finally decide the proper classification for omitted classes, but also the power to decide whether or not a class had been omitted. (64a, 67a).

2. Wage Practices and the Wage Determinations

The Corps of Engineers on March 1, 1957 invited bids for the construction of an embankment and spillway for the Bear Creek Reservoir on the Lehigh River in Carbon and Luzerne Counties, Pennsylvania. (86a). It is agreed that this work was "heavy construction" (82a, 58a). In preparation for the issuance of the invitation for bids, the Corps of Engineers had requested of the Secretary of Labor, pursuant to the Davis-Bacon Act, 40 U.S.C. § 276 (a), a determination of wage rates for the "entire schedule of crafts", i.e., every classification that might be found on a construction project. (86a)

This wage determination, as contained in the invitation for bids, included many crafts and classifications which would not be used in the performance of the contract work (91a, 90a). The wage determination generally reflected two sets of wage rates for similar classifications (e.g., carpenters, laborers, etc.): a higher set of rates under the headings of "Building" or "Building and Heavy Construction", and a lower set of wages under the headings "Heavy and Highway" and "Highway Construction" (104a-107a). Two sets of

wage rates were provided for power equipment operators—the employees whose classification is in dispute—the wages listed for them under the heading "Highway Construction" being approximately 60-85 cents an hour lower than the rates listed for power equipment operators under the heading "Building and Heavy Construction" (106a-107a).

The instructions to bidders contained the customary requirement that bidders visit the site of the work to ascertain local conditions such as . . . labor conditions[3] (114a). This requirement was also embodied in the construction contract (116a):

> The contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, including but not restricted to . . . availability of labor . . . Any failure by the contractor to acquaint himself with the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work . . .

Prior to bidding this project, petitioner's representatives made the required site inspection and investigation of local conditions and determined that at the project site employees, including power equipment operators, who were engaged in heavy construction or in highway construction were paid a uniform scale of wages which was lower than the scale of wages paid to the same classifications of employees when engaged in building construction or in the heavy construction

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[3] Similar pre-bid requirements for ascertaining labor conditions were contained in the invitation for bids in *U. S.* v. *Binghamton Const. Co.*, 347 U.S. 171, 173, n. 4.

incidental to building construction (61a, 86a).[4] The Court found that the petitioner's conclusion as to labor practices was correct, for it was the predominant practice at the site to pay the lower scale of wages for both heavy and highway construction (61a, 85a, 103a).

Petitioner prepared its bid on the basis of its determination of labor practices prevailing at the construction site. Petitioner's bid was $6,304,462, the next lowest bid was $7,317,778, and the Government's estimated cost was $8,013,944 (87a, 75a).

Shortly before the bid closing date the Corps of Engineers requested the Department of Labor to make another wage determination for this project. In this request the Corps certified to the Department of Labor, erroneously, that no highway-type work requiring the use of power equipment was involved (103a, 87a). The Department of Labor responded five days later with a new wage schedule which omitted the lower set of wages for power equipment operators previously listed under the heading "Highway Construction" (78a, 87a). This new wage determination continued to include the lower set of wages applicable to the other construction crafts and classifications (e.g., carpenters, laborers, etc.) under the heading "Heavy and Highway Construction" (108a-111a).

Petitioner, considering the new wage determination in the knowledge of its pre-bid investigation of labor conditions, concluded that there was an omission of the minimum wage rates for power equipment operators employable on the project, and accordingly adhered to its earlier determination of wage practices at

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[4] Building construction was not involved in the project—the required construction was primarily heavy construction with some highway construction.

the site. The Court found that petitioner's interpretation of the wage decision as reflecting omission of power equipment operators for heavy and highway construction was reasonable (103a, 61a).

On April 26, 1957 petitioner was awarded the contract (87a). On April 30, petitioner entered into a collective bargaining agreement with District 50, United Mine Workers, the union representing its employees on the Bear Creek Reservoir project. This agreement established wage rates for employees, including power equipment operators, at the lower scale of wages applicable to heavy and highway construction, identical to the rates then in force through the master contract between that union and the Associated Pennsylvania Constructors (87a, 84a). The rates for power equipment operators set forth in this collective bargaining agreement were comparable to the wage rates for power equipment operators listed under the heading "Highway Construction" in the first wage determination, which were omitted by the Department of Labor from the second wage determination on the instructions of the Corps of Engineers (65a).

On May 15, 1957 petitioner submitted to the Government on the standard form provided for this purpose (Form 1581) a request for authorization of additional classifications and rates for the power equipment operators[5] and attached a copy of its contract with the

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[5] Paragraph SC 17(b) of the General Conditions of petitioner's construction contract with the Corps of Engineers, provides in part (117a):

> Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned, subject to the prior approval of the contracting officer . . . .

union under which employees were being furnished to the project at the lower set of wages applicable to heavy and highway construction (88a).

The Contracting Officer, without considering the merits of petitioner's request, on the advice of his labor relations advisor, denied petitioner's request. As a result petitioner was required to pay increased wages to its power equipment operators amounting to $163,384.37 (102a).

3. The Administrative Channels of Decision

At this point commenced what the Commissioner referred to as the "confusing picture of erroneous representation to the Department of Labor by the Corps of Engineers followed by firm determination on the part of both agencies to perpetuate the error by relying on [and] deferring to the pronouncements of each other" (55a, n. 20). The first step was the denial of petitioner's request on May 23 by the Contracting Officer, who stated (88a):

> "A review of your submittal indicates that the so-called additional classifications you are requesting are either already contained in Department of Labor Decision No. R-13,689, which is part of your contract, or that they can be reclassified conformably to such decision, in accordance with the procedure set forth in paragraph SC-17 of the contract. Since you are, in effect, requesting a reduction in the applicable minimum rates, rather than additional classifications, your request is denied.
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> * * * * * * * *
>
> "The wage rates set forth in your contract have been determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent

locality and are the minimum rates which must be paid. If you feel that such rates are not in accord with the prevailing area practice, it is suggested that you present the matter to the Secretary of Labor for his decision."

At trial the Contracting Officer's labor advisor testified that when he received the second wage determination he noted and questioned the deletion of the "Highway Construction" category of power equipment operators and was informed by his agency that the deletion of this classification was correct (Pl. Ex. 11; Tr. 237-238). He acknowledged that at the time he prepared the Contracting Officer's decision denying petitioner the right to pay the omitted rates he was unaware that the power equipment operators had been omitted from the second wage determination under the heading "Highway Construction" upon the instructions of the Corps of Engineers.[6] His action in denying petitioner's request for the addition of these rates, he stated, was based on his interpretation of the language of the wage decision and his knowledge that the omission of this classification had been confirmed to him as correctly made. His decision was based on the naked assumption, without inquiry as to the facts, that the wage decision set forth the prevailing customs and practices (55a, n. 20; 90a-91a).

Petitioner protested the Contracting Officer's ruling by letter dated May 31, 1957. That letter stated in part (90a):

"As we have pointed out above, the Department of Labor Decision No. R-13,689, dated 11 March

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[6] Petitioner requested detailed findings of these uncontroverted facts. Plaintiff's Exceptions to Report of Commissioner, pp. 1-3, Fdgs. 20, 22A.

> 1957, includes duplications and inconsistencies. We think that this decision also includes no decision whatsoever with respect to the rates applicable to operators of power equipment on 'Heavy and Highway Construction.' Under the circumstances, we cannot proceed with the performance of this contract without being informed of your interpretation of this decision. * * *"

The Contracting Officer thereupon reiterated his earlier ruling, and ordered petitioner to pay its power equipment operators the higher scale of wages (90a, 97a). Petitioner appealed from these decisions, and requested an opportunity to be heard and present evidence in support of its appeal (91a-93a, 95a).

In its letters to the Contracting Officer, and the Chief of Engineers, petitioner consistently contended that the dispute was one between it and the Contracting Officer as to whether the Department of Labor's decision listed or omitted the minimum wages of power equipment to be employed on the project. This disagreement over the interpretation of a provision of the contract—the wage schedule—was, petitioner argued, a matter subject to the general disputes provisions of the contract and not subject to resolution under Paragraph SC-17(b) of the contract (94a-96a). The Chief of Engineers ultimately agreed in part, and although he submitted the matter to the Secretary of Labor over petitioner's objection he did not invoke Paragraph SC-17(b). His letter to the Solicitor of Labor stated (96a):

> "Although this is not a question as to the proper classification or rates to be considered in accordance with SC-17 of the contract and Section 5.6 (c) of Regulations, Part 5, the inclosed material is being referred to your office for a ruling or an

interpretation pursuant to Section 5.11 of Regulations, Part 5.'"

The decision making process then came full circle when an acting assistant solicitor of the Department of Labor, in a letter to the Chief of Engineers dated August 26, 1957, announced his concurrence in the Contracting Officer's decision of May 23, 1957. He declared (96a-97a):

> "Since the rates contained in Wage Determination No. R. 13,689 are prevailing in Carbon and Luzerne Counties, Pennsylvania, for the type of construction involved, we concur in the views of the Contracting Officer as contained in his letter of May 23, 1957, to the contractor."

On the basis of this concurrence the Contracting Officer again ordered the petitioner to pay the rates contained in the contract (97a). Thereafter the petitioner under protest paid the higher "building and heavy construction" rates to its power equipment operators, and continued to pay with the Contracting Officer's approval, the lower "heavy and highway construction" rates for all its other employees (98a-99a).

When petitioner's appeals were considered by the Corps of Engineers Claims and Appeals Board it granted the Government's motion to dismiss for lack of jurisdiction, on the ground that "a decision as to whether the power equipment operators are to be paid at rates prescribed for 'Building and Heavy Construc-

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[1] Section 5.11 of the Regulations, Part 5, Title 29, Subtitle A, Code of Federal Regulations states, "All questions arising in any agency relating to the application and interpretation of regulations contained in this part and of the Davis-Bacon Act, as amended, . . . shall be referred to the Secretary of Labor for appropriate ruling or interpretation" (114a).

tion' or at rates to be determined as prevailing for 'Highway and Heavy Construction' is more properly a decision for the Department of Labor than for this Board" (101a).

4. The Decision of the Court of Claims

The Court found that the predominant practice in the pertinent area was that power equipment operators engaged in heavy construction and in highway construction were paid at the same scale of wages, and that that scale was lower than the building and heavy construction scale (59a, 85a). It found also that petitioner's interpretation of the wage decision as reflecting omission of power equipment operators for heavy and highway construction was reasonable (103a) and that petitioner's bid had been prepared on the basis of the heavy and highway construction wage scales (87a). These facts, however, were treated as irrelevant by the Court.

It phrased what it termed the ultimate issue in the case—to which petitioner objected in its motion for reconsideration—as "whether or not the Secretary of Labor made a determination of the rates to be paid power equipment operators under the contract" (64a). Its answer was affirmative, "We believe that there was such a determination; that it was embodied in Wage Decision R-13,689 which was made a part of the contract; that under *United States* v. *Binghamton Construction Co.*, 347 U.S. 171 (1954) we cannot review the correctness of the determination . . ." (64a).

The majority never questioned, as the dissent pointed out, the authority or the propriety of the contracting agency's decision to refer the dispute to the Secretary (71a-72a). Focusing on the decision of the Secretary

of Labor, the Court stated, "We believe that the Secretary of Labor had the power not only to decide the proper classification for omitted classes, but also the power to decide whether or not a class had been omitted" (67a). Having held that the Secretary made such a determination, the Court deemed itself precluded by *Binghamton* from questioning its validity. It concluded that the decision of the Secretary was final—apparently under both SC-17b of the contract and Sec. 5.11 of the Regulations—and dismissed the petition (68a-69a).

Judge Whittaker dissented. It was his view that neither *Binghamton* nor any rule of law immunized a decision by either the Contracting Officer or the Secretary of Labor from judicial scrutiny of the facts underlying such decision. Pointing out that the Wunderlich Act provided that a Contracting Officer's decision could be reviewed if arbitrary or capricious, or not supported by substantial evidence, he believed that the action of the Secretary should stand on no better footing. (72a-73a).

REASONS FOR GRANTING THE WRIT

1. Adherence to the proposition that the Secretary of Labor has the power to decide conclusively the proper classifications for classes of laborers and mechanics omitted from (or included in) a wage determination, will have substantial adverse consequences upon the vast number of contractors performing Government contracts. Its effect, as evidenced by the case at bar, is to impose on the Government contractor the risk of being required to pay increased wage rates based on erroneous and unrealistic classifications of workers, and to stifle any opportunity of the contractor to present evidence in rebuttal.

The basic dispute was between the petitioner and the contracting agency over the appropriate classification of a category of employees. The procedure specified in the standard Disputes clause of Government contracts, as here, is a decision by the Contracting Officer at the initial stage and then, if the dispute is not resolved, by a board of contract appeals after a hearing. Under this arrangement the contractor is entitled to present his version of the facts to the body which has the power to decide (115a). If the board's decision is not supported by substantial evidence, or is arbitrary or capricious, the contractor under the Wunderlich Act can then seek redress in the Court of Claims.[8]

But instead of affording petitioner the customary channels of appeal and hearing in the matter, the Corps of Engineers shut off any opportunity for the contractor to be heard by referring the matter to the Solicitor of Labor for an *ex parte* decision (63a). By attributing authority to act in this matter to the Secretary, the Corps of Engineers precluded, as it turned out, all opportunity for review, for both the Appeals Board and the Court of Claims were persuaded that this was a matter for conclusive determination by the Secretary of Labor.

Had the petitioner, or any contractor, bargained for a particular set of wage rates he would be precluded from protesting no matter how erroneous the Secretary's decision. When a Davis-Bacon rate contained

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[8] Indeed, resolution of the dispute on the basis of the facts established in a proceeding under the standard Disputes provisions of Government contracts is a meaningful corollary to the duty imposed on the contractor by the terms of the invitation for bids, and by the construction contract, to make a pre-bid investigation of labor conditions and of the costs of performing the work (114a, 116a).

in a contract is unreasonably high and in no wise prevailing, the contractor who executes such a contract is of course bound by it.

When the question of appropriate classification is involved, however, quite different considerations apply. In such cases a reading of the terms of the contract will not suffice for the applicable classifications are not self-evident. The most a contractor can do is to investigate the labor conditions and determine for himself the applicability of job classifications, recognizing that if he errs it is at his own economic peril. But he surely expects to retain control of his labor costs to the extent that he can support his position by submitting evidence of local practices—as he is entitled to do under the Disputes clause of his contract.

The arrangement between the Corps of Engineers and the Department of Labor took all control out of the contractor's hands, and placed him at the mercy of a subordinate official of the Department of Labor (63a, 96a). It is unthinkable that a contractor would—or that petitioner did—bargain for such a procedure. The conclusion is inescapable that by virtue of the Corps of Engineers' abdication of responsibility to the Department of Labor, whose action erroneously imposed the higher set of wage rates, the contractor was not only compelled to pay substantially higher wage rates than he reasonably expected to pay (103a), but was deprived of his day in court to protest.

This procedure has an ominous ring for all Government contractors whose contracts contain wage determinations by the Secretary of Labor. The contractor's pre-bid investigation of wage practices becomes a meaningless obligation if the Secretary of Labor possesses and exercises the power not only to set forth wages

prior to the award of a contract (a power the Secretary clearly possesses), but also possesses and exercises the power to determine—even arbitrarily—which of several wage rates listed in the contract (or omitted from the contract) the contractor must pay.

The Court held that this authority exists under a contractual clause such as SC-17(b) as well as under Section 5.11 of the Regulations.[9] Hence the decision of the Court makes clear its belief that *any* question of classification may properly be the province of the Secretary, irrespective of whether an omission had occurred. The same authority would presumably exist where all crafts are listed, both with respect to broad classifications of employees, viz., whether the heavy and highway scale (106a, 111a), the free air tunnels and rock shafts scale (106a, 111a), or the building scale (106a, 110a) should be applied, or with respect to narrow job classifications, viz., whether the plumber rate or the pipelayer rate should be applied. In the case at bar, for example, the question of the proper classification would, under the Court's rationale, have been referrable to the Secretary by reason of Section 5.11, even if both the "Building and Heavy" and the "Highway" sets of rates were listed for power equipment operators.

The number of contracts subject to wage determinations by the Secretary is enormous. Although prevailing wage determinations were initially required only by the Davis-Bacon Act, in contracts for the construction, alteration and/or repair of public buildings and

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[9] For a discussion of the inapplicability of Section 5.11, see pp. 25-27, *infra*.

public works, they now are required by the following statutes as well:

Hospital Survey and Construction Act, 42 U.S.C. § 291

Federal Airport Act, 49 U.S.C. § 1101

School Survey and Construction Act of 1950, 20 U.S.C. § 631

Defense Housing and Community Facilities and Services Act, 42 U.S.C. § 1952

Federal Civil Defense Act of 1950, 50 App. U.S.C. § 2251

Area Redevelopment Act of 1961, 42 U.S.C. § 2501

Delaware River Basin Compact, 75 Stat. 688

Federal-Aid Highway Act of 1958, 23 U.S.C. 101

National Housing Act, Sections 207 and 608, 12 U.S.C. §§ 1713, 1743

In fiscal 1963, total Government spending for construction was expected to exceed eight billion dollars. H. R. Rep. No. 308, 88th Cong., 1st Sess. 11 (1963).

The number of wage determinations by the Department of Labor continues to increase each year and has grown to staggering proportions. In 1961 the Department issued 44,977 wage determinations, involving almost 5,000,000 individual wage minimums—with a staff of only 19 professional employees. Hearings on the Administration of the Davis-Bacon Act before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess., pt. 1, at 48, 64 (1962). In view of the speed with which these determinations must be prepared by the Department— an average of more than 170 per work-

ing day—*all* contractors run a serious risk of being accorded the same slipshod treatment imposed upon the petitioner.

2. Even if the Secretary possessed authority to determine the appropriate classifications of workers employable on a particular project, either under the contract or the statutory or regulatory scheme, the Court of Claims applied a wholly erroneous standard of review to the Secretary's action—a standard which amounted to no review at all. The abdication of meaningful review by the Court was predicated upon its misconstruction of the decision of this Court in *United States* v. *Binghamton Construction Co.*, 347 U.S. 171.

We do not take issue with the proposition, announced in *Binghamton,* that the accuracy of wage rates as listed in contract specifications is not subject to judicial review. We do take issue with the Court of Claims' declaration that, with immunity from review, the Secretary may, after the incorporation of his wage determination in a construction contract, select the classifications to be employed by the contractor. Such immunity is particularly offensive where, as here, the classifications imposed bear no relation to the recognized, prevailing local practices.

In the case at bar no consideration was ever given to the merits of the contractor's claim or to the absence of any factual support for the Department of Labor's purported determination as to the appropriate classification. This Court, we submit, never intended *Binghamton* to be an instrument for such sweeping authority in the Secretary. Yet in reliance on that case the Court of Claims substituted an *ex parte* ruling by the Department of Labor for the contractual safe-

guards, including a hearing and taking of evidence by an administrative appeals board, afforded a contractor where a dispute arises during the performance of its contract (115a-116a).

The *Binghamton* case held that a schedule of minimum wages in a construction contract subject to the Davis-Bacon Act was not a warranty or representation to the contractor that he would not have to pay more than the listed rates in order to obtain the requisite labor for performance of its contract. There the contract provided that the contractor's wages be "not less" than those specified in a wage schedule contained therein furnished by the Secretary of Labor. That decision would appear to be wholly irrelevant to the case at bar, inasmuch as in *Binghamton* the contractor was protesting the adequacy of wage rates set forth in the contract it had signed and in the case at bar the contractor protested classifications it asserted were not contained in the contract and to which it objected.

The Court of Claims, however, apparently seized upon a dictum in *Binghamton* that "The correctness of the Secretary's determination is not open to attack on judicial review", 347 U.S. at 176. The Court of Claims, it would seem, loses sight of the context in which the quoted statement was made.[10] In our view it was intended to convey no broader rule than that a contractor had no right to question the accuracy of the wage rates set forth in its contract. *Binghamton* does not support the Court of Claims' general disclaimer of

[10] The paragraph in which it appeared began, "The Act itself confers no litigable rights on a bidder for a Government construction contract."

reviewing authority where decisions of the Secretary of Labor are concerned.

The Court's error was aggravated by its application of *Binghamton* to a situation where no decision had in fact been made by the Department of Labor. Here the contracting agency relied solely on *its* interpretation of what the amended wage schedule meant and when the contractor persisted in its objection, the contracting agency secured and relied on a statement by a subordinate official in the Solicitor's office (96a) that the Department concurred in the Contracting Officer's understanding of what the Department of Labor meant.[11] The Court was well aware that the Department of Labor had excluded the correct classifications—those contained in the original wage determination under the heading "Highway Construction"—at the direction of the Corps of Engineers, and that by concurring in the Contracting Officer's decision the Department was merely rubber-stamping the contracting agency's earlier direction (87a, 103a). To hold that the latter action constituted a decision or determination attributes a measure of independent judgment to the Department which simply did not exist. Nevertheless, on the basis of *Binghamton* the Court felt itself powerless to grant relief.

As the dissent observes, there is no basis for the belief that a decision of the Secretary that certain classifications are to be employed is immune from review, for neither the statutory or contractual scheme

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[11] The misunderstanding was compounded by the fact that the Contracting Officer's interpretation was made without knowledge that the applicable classification had been deleted at the erroneous instruction of his own agency, *supra*, p. 10.

suggests or countenances an arrangement where, as here, the contractor is effectively precluded from having any voice, or presenting any evidence, with respect to the final decision which adversely affects it. Indeed, the Wunderlich Act, 41 U.S.C. Sec. 321, provides that notwithstanding any provision in Government contracts that the decision of an agency or department head is final and conclusive, such a decision can be reviewed by the courts if arbitrary or capricious or not supported by substantial evidence. The provision in SC-17(b) providing for referral to the Secretary for "final determination" appears to be plainly subject to this restriction. The Court accordingly was empowered to determine whether the Department's opinion was supported by substantial evidence. Had such a test been applied, clearly the Department's ruling would have been overturned.

The Court also applied an erroneous standard of review in its unquestioning acceptance of the contracting agency's referral of the question to the Department of Labor. Section SC-17(b) of the contract provides that where a class of employees is not listed in the wage schedule it shall be classified conformably to the wage schedule by mutual agreement of the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer (117a). Only in the event the "interested parties" cannot agree on the proper classification is the question to be forwarded to the Secretary of Labor. Having rejected our view that the Contracting Officer was not an "interested party" within the meaning of SC-17(b), the Court was still required to scrutinize the decision of the contracting agency to forward the question to

the Secretary of Labor. At no time did the majority examine the basis of the decision of the Contracting Officer to withhold his "prior approval", an omission focused upon by dissenting Judge Whittaker, who pointed out (71a):

> "There was, therefore, no justification for the contracting officer to disapprove the contract plaintiff had made with the union. It follows that the Chief of Engineers should have reversed the contracting officer and should have approved the contract."

It is inconceivable that the Contracting Officer was empowered by the contract to withhold his approval arbitrarily or for insufficient reason. The Court of Claims, however, apparently recognized no such limitation.

3. The asserted authority of the Secretary of Labor to decide which classifications of laborers and mechanics are properly employable on Government construction has been vigorously opposed by another department of the federal Government, the Comptroller General. He pointed out, 40 Comp. Gen. 557:

> "So far as the fixing of the wage floors included in the specifications is concerned, the statutory function of the Secretary of Labor is exhausted once he has furnished a prevailing wage determination and a contract has been awarded containing a minimum wage schedule based thereon . . ."

The position of the Comptroller General as to the absence of such enforcement functions in the Secretary was well expressed in testimony before a subcom-

mittee of the House of Representatives in 1962, where his representative stated:[12]

> "Three different Government agencies—the contracting office, the Department of Labor and the General Accounting Office—participate in the establishment and enforcement of minimum wage requirements under such contracts. Strange as it may seem to those acquainted only cursorily with Davis-Bacon Act provisions, the only authority expressly conferred upon the Secretary of Labor by the act itself is that of determining prevailing wages. It is the duty of contracting agencies to see that wage requirements based upon such determinations are advertised in Government invitations to bid, to make such requirements conditions of contracts, and to verify compliance therewith in performance of the work. In the event of disagreement as to compliance, contracting agencies are not expected to make final enforcement determinations but are restricted to withholding appropriate portions of contract prices for use by the General Accounting Office in adjusting wage underpayments directly with the aggrieved employees. Responsibilities of making wage adjustments and of imposing debarment are entrusted by the terms of the Davis-Bacon Act exclusively to the independent judgment of the General Accounting Office."

Contracting agencies of the Government likewise have refused to recognize authority in the Secretary of Labor to resolve classification disputes, and have deemed it the agency's responsibility to enforce the wage rate provisions as part of its contract administra-

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[12] Hearings on the Administration of the Davis-Bacon Act before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess. 284 (1962).

tion. In *J. R. Cianchette,* 60-2 BCA 2814, an air force panel of the Armed Services Board of Contract Appeals reversed the contracting officer's decision and held that earth-moving work performed under that contract required the payment of the lower scale of wages for heavy and highway construction rather than the higher building construction rates.

That decision was cited and followed in the 1963 decision by the Armed Services Board sustaining the appeal in *R. E. Lee Electric Co.,* 63 BCA 3884. There, in response to the Government's contention that the Board lacked jurisdiction to resolve the classification dispute the Board held:

> "The 'Disputes' article clearly gives a contractor the right to appeal a decision by a contracting officer concerning a question of fact arising under this contract. We find nothing in the contract, the Davis-Bacon Act, the regulations of the Department of Labor, or in the Comptroller General decision cited by the Government which would justify a conclusion that the right to appeal granted by the 'Disputes' article does not apply to determinations such as the one now in issue."[13]

It is plain that in the light of the Wunderlich Act, the terms of the contract (including SC-17b) cannot insulate from review a decision on a disputed question of fact relating to a classification matter. Decisions on such disputes are as a matter of contract subject to judicial review if not supported by substantial evi-

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[13] In the case at bar, after the Department of Labor had confirmed the Contracting Officer's initial decision, he treated the Department's decision as his own, and as one involving questions of fact which were subject to review on appeal under the Disputes article (97a).

dence. The Court of Claims, it seems, tacitly recognizes this by using Sections 5.6 and 5.11 of the Secretary's Regulations as props for its view that the Secretary's decision was final and conclusive.

In essence the Court held that Section 5.11, which provides for referral to the Secretary of questions relating to "the application and interpretation of . . . regulations", governs the application and interpretation of terms in a particular wage determination contained in a contract. Since the Secretary was not a party to the contract, it is not apparent how his regulations could be deemed to be included therein. Thus, even if—contrary to the fact—the Secretary, prior to the award of the contract, had promulgated regulations pertaining to the definition of building, heavy and highway construction, it is doubtful that Section 5.11 would have been a relevant means of construing petitioner's contract. But it is far-fetched indeed to construe authority to interpret "regulations", which presumably are edicts of general application, to mean authority to interpret and administer the wage provisions of a specific contract.

The applicability of Sections 5.6 and 5.11 was considered by an army panel of the Armed Services Board of Contract Appeals in *Linoleum Specialty Shop, Inc.*, 59-1 BCA 8981. After the contractor's appeal from a decision of the contracting officer relating to the classification of work performed by certain employees was sustained (57-2 BCA 5111) the Government moved for reconsideration on the ground that Sections 5.6 and 5.11 of the Regulations vested exclusive and final authority in the Secretary and thereby excepted the disputed questions of fact from

the application of the Disputes article of the contract. Affirming its disposition of the case pursuant to the Disputes article and denying the motion for reconsideration, the Board asserted:

> "The Board's opinion, however, did not decide any questions relating to the interpretation or application of the regulation or statutes. It was limited to findings of fact."

In the case at bar, as in the *Lee, Cianchette* and *Linoleum Specialty* cases, *supra,* the issue does not turn on the interpretation of any regulation issued by the Secretary of Labor. By failing to recognize so essential a proposition, the Court of Claims has bestowed unwarranted power upon the Secretary of Labor, and thereby stripped all Government contractors of contractual safeguards they heretofore thought they had.

CONCLUSION

For the aforementioned reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January , 1966

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 274-59

NELLO L. TEER COMPANY, *Plaintiff*

v.

THE UNITED STATES, *Defendant*

Petition

(Filed June 22, 1959)

To the Honorable the Court of Claims:

Plaintiff respectfully represents:

1. That the Nello L. Teer Company is a corporation organized and existing under the laws of the State of Delaware, and engaged in the heavy construction business, with its main office located in Durham, North Carolina.

2. That defendant under date of March 1, 1957 issued invitation for bids numbered CIVENG 36-109-57-92 for the construction of a dam including embankment, spillway and completion of outlet works at Bear Creek Reservoir, Lehigh River, Pennsylvania. That included as a part of the bid specifications was Department of Labor Decision No. R-10,416, dated January 17, 1957, setting forth certain rates of wages for building construction, and heavy construction, determined by the Secretary of Labor to be prevailing wages pursuant to the provisions of the Davis-Bacon Act (40 U.S.C. 276a). Paragraph SC-17, Rates of Wages, containing the aforementioned wage rates, is attached hereto as Exhibit A and made a part hereof.

3. That defendant under date of March 18, 1957, issued as Addendum No. 1 to the invitation for bids identified in paragraph 2 above, a revision of paragraph SC-17b of the specifications, Department of Labor Decision No. R-13,689,

dated March 11, 1957, setting forth certain rates of wages for building construction, and heavy construction, and representing increases in certain of the minimum rates of wages set forth in the original wage determination. The revision of paragraph SC-17b contained in Addendum No. 1 is attached hereto as Exhibit B and made a part hereof.

4. That plaintiff, as a result of competitive bids submitted in response to the invitation identified in paragraph 2 above, and opened on April 1, 1957, was awarded, and entered into a contract with defendant, acting through the Corps of Engineers, U. S. Army, identified as contract No. DA-36-109-CIVENG-57-205, and dated April 26, 1957, for a stated consideration to plaintiff of $6,304,462.70. Excerpts from the said contract are attached hereto as Exhibit C and made a part hereof.

5. That the Secretary of Labor had not, prior to April 1, 1957, published any regulation or prescribed any standard for the classification of construction projects as building construction, or heavy construction, for the purpose of determining the minimum wage rates to be paid in the performance of the construction work.

6. That as a matter of industry practice and of custom and practice in the area in which the subject project is located, workers on projects of the kind described in paragraph 2 above are paid, and on March 11, 1957, were paid, according to the rates of wages applicable to heavy construction.

7. That plaintiff under date of April 30, 1957, entered into a contract with the United Construction Workers, Division of District 50, United Mine Workers of America, which was the union acting as the collective bargaining agent for plaintiff's employees on the subject construction project. A part of this employer-employee contract entitled "Wage Scale" is attached hereto as Exhibit D and made a part hereof. That the wage scales to be paid

by plaintiff to its employees engaged in the operation of certain power and mechanical equipment on the subject project under the aforementioned collective bargaining agreement were the wage rates then and there prevailing, and were the wage rates prevailing on March 11, 1957, for workers engaged in heavy construction.

8. That plaintiff proceeded with the performance of the work covered by the contract described in paragraph 4 above and paid its employees engaged in the operation of power and mechanical equipment according to the wage rates provided for by the collective bargaining agreement identified in paragraph 7 above, and that plaintiff in accordance with the provisions of paragraph SC-17(b) of the Special Conditions, (the provisions of which are included as a part of Exhibit A) submitted to the contracting officer the wage scales for equipment operators on heavy and highway construction work which had been omitted from the Secretary of Labor's Decision No. R-13,689, and requested approval of these wage rates conformably with plaintiff's contract with the Union. A copy of plaintiff's request for approval is attached hereto as Exhibit E and made a part hereof. The contracting officer, by letter dated May 23, 1957, disregarded plaintiff's contract rights and refused to approve the wage rates conformably to the agreement between plaintiff and the Union. The contracting officer, under date of September 9, 1957, ordered plaintiff to make restitution to all laborers and mechanics employed, and in the future to pay all workers the higher rates of wages applicable to building construction set forth in Wage Determination No. R-13,689. Plaintiff complied with this order under protest, and duly appealed from the decisions of the contracting officer, which appeal was docketed as Corps of Engineers Claims and Appeals Board, Case No. 1372. The said Board under date of April 18, 1958, granted the Government's Motion to Dismiss this appeal for lack of jurisdiction of the subject

matter. This decision is attached hereto as Exhibit F and made a part hereof.

9. Plaintiff made restitution to its employees in accordance with the order of the contracting officer dated September 9, 1957, and has since paid its employees at the higher wage rates in compliance with the aforesaid order and will be compelled under the said order to continue to pay its employees at these higher wage rates through the completion of the subject project, and the resulting costs to plaintiff incurred and to be incurred will amount to $250,000.00.

10. WHEREFORE, the premises considered, plaintiff demands judgment of the defendant in the amount of $250,000.00 and costs.

JOSEPH C. WELLS
Attorney for Plaintiff
1120 Tower Building
Washington 5, D. C.

PAUL M. RHODES
Of Counsel

EXHIBIT A

SC-17 RATES OF WAGES:

(a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as set forth below.

(b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned,

subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanies (sic) by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

[The remainder of Exhibit A and Exhibit B to the Petition have been omitted. They are identical to Exhibits A and B contained in the Appendix to the Opinion of the Court of Claims, printed at pp. 104a-111a, *infra*.]

EXHIBIT C

EXCERPTS FROM CONTRACT No. DA-36-109-CIVENG-57-205

• • • • • •

Statement of Work. The Contractor shall furnish all labor, equipment, and materials and perform the work above described for the amount stated above in strict accordance with the General Provisions (Standard Form 23a), specifications, schedules, drawings, and conditions all of which are made a part hereof and designated as follows:

Specifications for Bear Creek Reservoir Embankment, Spillway and completion of Outlet Works, Lehigh River, Pennsylvania, Invitation No. CIVENG-36-109-57-92, dated 1 March 1957, and Addenda Nos. 1, 2, 3 and 4, dated 18 March, 27 March and 29 March 1957, and 4 April 1957, respectively.

Drawings as listed and described in paragraph SC-5 of the specifications.

Schedule of Items and Prices (Schedule "A").

• • • • • •

1. DEFINITIONS.—(a) The term "Secretary" means the Secretary of the Army; the terms "Secretary of the Army" or "Head of the Department" as used herein shall have

one and the same meaning; and the term "his duly authorized representative" means the Chief of Engineers, Department of the Army, or an individual or board designated by him.

(b) The term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

• • • • • •

6. DISPUTES.—Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

• • • • • •

20. DAVIS-BACON ACT (40 U.S.C. 276a-a(7))

(a) All mechanics and laborers employed or working directly upon the site of the work will be paid unconditionally and not less often than once a week, and without sub-

sequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Act (Anti-Kickback) Regulations (29 CFR, Part 3) the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and a copy of the wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

(b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(c) Paragraphs (a) and (b) of this clause shall apply to this contract to the extent that it is (1) a prime contract with the Government subject to the Davis-Bacon Act or (2) a subcontract under such prime contract.

EXHIBIT D

WAGE SCALE

United Construction Workers, Affiliated With United Mine Workers of America

and

Nello L. Teer Company

Wage scale applies to the construction of the Bear Creek Reservoir Embankment, Spillway, and completion of outlet works, Lehigh River, in Carbon and Luzerne Counties, Pennsylvania, Contract No. CIVENG-36-109-57-92.

Effective April 30, 1957.

Common Labor	**$1.60**
Labor Class 2	
Air Tool Operator, Jack Hammer, Pavement Breaker, Tamper, etc.	**1.75**
Batchman	**1.65**
Concrete Pitman, Puddlers and Rubbers	**1.65**
Truck Driver	**1.75**
Labor Class 3	
Wagon Drill Operator	**1.90**
Form Setter	**2.25-2.55***
Blaster	**2.05**
Euclid Driver	**1.95**
Edgers	**1.85-2.25***
Jointmen	**1.85-2.25***
Carpenter	**2.55**
Cement Finisher (Pavements, Decks, etc.)	**2.35-2.65***
Carpenter (Apprentice)	**2.05-2.35***
Equipment Operator, Class 1	
Roller	**1.95**
Tractor	**1.95**
Stone Spreader	**2.05**
Concrete Finishing Machine	**2.05**
Concrete Spreader	**2.05**
Concrete Mixer	**2.05**
Hi-Lift Loader (Overhead)	**1.95**
Hoist	**1.95**
Mechanic	**2.25-2.45***
Welder	**2.25-2.45***

Equipment Operator Class 2

Bulldozer	2.35
Carryall	2.35
Asphalt Finishing Machine	2.05
Power Grader	2.35
Gradall	2.55
Ditchers	2.55
Shovels Under 1 Cu. Yard	2.55
Cranes Under 1 Cu. Yard	2.55

Equipment Operator Class 3

Shovel 1 Cu. Yard and Over	2.75
Cranes 1 Cu. Yard and Over	2.75
Backhoe 1 Cu. Yard and Over	2.75
Dragline 1 Cu. Yard and Over	2.75
Concrete Paving Mixer	2.75
Elevating Grader	2.75
Pile Driver	2.75

Additional Occupations

Helper	1.65
Stone Finisher	1.75
Oiler	1.85
Stone & Asphalt Roller Operator	2.00-2.25*
Mechanic (Lead)	2.60
Hand Gasoline Tool Operator	1.65
Asphalt Finishing Machine Screed	2.25

STEEL ERECTION

Classification

Crane Operators—	
Stiff Leg and Travelers	3.25
Crane Operators—General	2.75
Heaters—Catchers	2.75-3.25*
Riveters—Buckers	2.75-3.25*
Bolters—Buckers	2.75-3.25*
Steel Setters	2.75-3.25*
Welders (Certified)	3.25

* It is the intention of the parties that these rate ranges specified above provide a minimum rate and a range to be used to provide incentive pay increases for efficient performance by employees, and the Union reserves the right to negotiate for such increases.

EXHIBIT E

Department of the Army—Corps of Engineers
Request for Authorization of Additional Classification and Rate
(Lump Sum Contracts)

Date of Request 15 May 1957

To: Department of the Army, Office, Chief of Engineers, Washington 25, D. C. Attn. Engac
From: Thru:

Project Bear Creek Reservoir Location Lehigh River

County Carbon and Luzerne State Pennsylvania

Contract Number DA-36-109 CIVENG-57-205
Date of Contract 26 April 1957

In order to complete the work provided for under the above contract, it is necessary to establish the following rate(s) for the indicated classification(s) not included in the Department of Labor determination No. R-13689 dated 11 March 1957 for the following location Bear Creek Reservoir, Luzerne and Carbon Counties, Pennsylvania.

Signatures of the representatives of the contractor and of the class of labor concerned indicate mutual agreement upon the rate(s) and classification(s).

Classification(s). See Attachments Consisting of two (2) pages covering thirty-two (32) classifications.

Labor Representative (Signature) A. D. Lewis

Labor Organization (Name and Address)
United Construction Workers, Division of District 50, United Mine Workers
900 Fifteenth St., N. W., Wash., D. C.

Title of Representative Director

Approved (Signature of Contracting Officer and date)

Contractor Representative (Signature) Nello L. Teer, Jr.

Contractor (Name and address)
Nello L. Teer Company
Durham, North Carolina

Title of Representative President

Resident Engineer (Resident Engineer's signature will verify that the signatories above are acceptable to him)

Classifications	Rates	Effective Date (*First use on above contract*)
HEAVY AND HIGHWAY CONSTRUCTION		
Equipment Operator, Class 1		
Roller	1.95	May 20, 1957
Tractor	1.95	May 20, 1957
Stone Spreader	2.05	May 20, 1957
Concrete Finishing Machine	2.05	May 20, 1957
Concrete Spreader	2.05	May 20, 1957
Concrete Mixer	2.05	May 20, 1957
Hi-Lift Loader (Overhead)	1.95	May 20, 1957
Hoist	1.95	May 20, 1957
Mechanic	2.25-2.45*	May 20, 1957
Welder	2.25-2.45*	May 20, 1957
Equipment Operator, Class 2		
Bulldozer	2.35	May 20, 1957
Carryall	2.35	May 20, 1957
Asphalt Finishing Machine	2.05	May 20, 1957
Power Grader	2.35	May 20, 1957
Gradall	2.55	May 20, 1957
Ditchers	2.55	May 20, 1957
Shovels Under 1 Cu. Yard	2.55	May 20, 1957
Cranes Under 1 Cu. Yard	2.55	May 20, 1957
Equipment Operator, Class 3		
Shovel 1 Cu. Yard and Over	2.75	May 20, 1957
Cranes 1 Cu. Yard and Over	2.75	May 20, 1957
Backhoe 1 Cu. Yard and Over	2.75	May 20, 1957

Classifications	Rates	Effective Date (*First use on above contract*)
Dragline 1 Cu. Yard and Over	2.75	May 20, 1957
Concrete Paving Mixer	2.75	May 20, 1957
Elevating Grader	2.75	May 20, 1957
Pile Driver	2.75	May 20, 1957
Additional Occupations		
Helper	1.65	May 20, 1957
Stone Finisher	1.75	May 20, 1957
Oiler	1.85	May 20, 1957
Stone & Asphalt Roller Operator	2.00-2.25*	May 20, 1957
Mechanic (Lead)	2.60	May 20, 1957
Hand Gasoline Tool Operator	1.65	May 20, 1957
Asphalt Finishing Machine Screed	2.25	May 20, 1957

* It is the intention of the parties that these rate ranges specified above provide a minimum rate and a range to be used to provide incentive pay increases for efficient performance by employees, and the Union reserves the right to negotiate for such increases.

EXHIBIT F

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON 25, D. C.

Before the Corps of Engineers Claims and Appeals Board

Eng C&A Board Decision No. 1372

Appeal of

NELLO L. TEER COMPANY

Under Contract No. DA-36-109-CIVENG-57-205

* * * * * * *

Decision

Admittedly, this motion raises problems on which there has been no firm resolution as yet by all of the Governmental agencies concerned. Nonetheless, we are of the opinion that a decision as to whether the power operators are to be paid at rates prescribed for "Building and Heavy Construction" or at rates to be determined as prevailing for "Highway and Heavy Construction" is more properly a decision for the Department of Labor than for this Board. A decision by this Board would obviously have no binding effect on either the Secretary of Labor or on any contractor other than the present appellant on this very appeal. Yet by its very nature a determination of the proper wages to be paid power operators in Carbon and Luzerne Counties, of Pennsylvania, should have a general application to all contractors within an area—in other words, it must literally be "prevailing"—and the responsibility to fix such a prevailing wage pattern is clearly that of the Secretary of Labor.

Our view is reaffirmed by the fact that the Secretary of Labor, in a letter dated 8 April 1957 to the Secretary of Navy has asserted the position that Regulations, Part 5 (29 CFR, Subtitle A), issued pursuant to Reorganization Plan No. 14, impose a duty on the part of all Government

agencies to submit to the Secretary of Labor all questions concerning the application of labor standard laws and provisions for appropriate ruling or interpretation, and has concluded therefrom that the making of final and conclusive determination by Contract Appeals Board would be inconsistent with the duties required of the Secretary of Labor. Both policy and logic compels a compliance with this view.

Accordingly, for the reasons stated, the Motion to Dismiss is granted and the appeal is dismissed.

Date: 17 April 1958

/s/ Harold F. Blasky
Harold F. Blasky
Member of the Board

I *concur*

/s/ Leonard L. Roth
Leonard L. Roth
Member of the Board

I *concur*

/s/ E. Manning Seltzer
E. Manning Seltzer
Chairman of the Board

Defendant's Answer

(Filed December 21, 1959)

Defendant, for its answer to the petition filed herein, alleges as follows:

1. & 2. Admits the allegations in paragraphs numbered 1 and 2 of the petition.

3. Admits that defendant issued under date of March 18, 1957 as Addendum No. 1 to the invitation for bids, a re-

vision of paragraph SC-17b of the specifications, Department of Labor Decision No. R-13,689 dated March 11, 1957, and denies the remaining allegations of paragraph 3 of the petition except as borne out in said Addendum No. 1.

4. Admits the allegations in paragraph 4 except it alleges that the bids were opened on April 9, 1957.

5. Denies the allegations in paragraph 5 of the petition and states that Plaintiff's Exhibit B to its petition set forth the rate of wages applicable to the project.

6. Admits the allegations of paragraph number 6 of the petition.

7. Defendant lacks knowledge or information sufficient to form a belief as to the truth of matters alleged in paragraph 7 of the petition and therefore denies the same.

8. Admits the allegations set forth in the first two sentences of paragraph number 8 of the petition. Denies the allegations of the third sentence of said paragraph number 8 except admits that the contracting officer sent a letter dated May 23, 1957 to plaintiff. Admits the allegations of the fourth sentence of said paragraph 8 except alleges that the words "rates of wages applicable to building construction set forth in Wage Determination No. R-13,689" should read instead, "rates of wages applicable to heavy construction set forth," etc.

Admits the remaining allegations in said paragraph number 8 except denies that the appeal from the decisions of the contracting officer was "duly" taken.

9. Defendant lacks knowledge or information sufficient to form a belief as to the matters alleged in paragraph 9 of the petition, and therefore denies the same.

10. Denies plaintiff's right to judgment.

11. Except as hereinabove admitted, denied, or qualified, denies each and every allegation contained in the petition.

AFFIRMATIVE DEFENSE

12. Defendant alleges that the petition herein fails to state a claim upon which relief can be granted.

GEORGE COCHRAN DOUB
Assistant Attorney General
Civil Division

CLARE E. WALKER
Attorney, Civil Division
Department of Justice

Defendant's First Amended Answer

(Filed December 18, 1962)

Comes now the defendant, by its Acting Assistant Attorney General, and files this first amended answer to plaintiff's petition.

2. Defendant admits the allegations in paragraph 2 of the petition, except the words "for building construction, and heavy construction" in the second sentence of that paragraph. Defendant alleges that Department of Labor Decision No. R-10,416, dated January 17, 1957, is the best evidence, and defendant admits these allegations only to the extent that they are borne out by Department of Labor Decision No. R-10,416.

8. Defendant denies that portion of the first sentence of paragraph 8 of the petition which reads "on heavy and highway construction work which had been omitted from the Secretary of Labor's Decision No. R-13,689." Defendant alleges that the wage rates for equipment operators which plaintiff submitted to the contracting officer were the wage rates in its union contract with United Construction Workers, Division of District 50, United Mine Workers of America. Defendant expressly denies that such union

contract wage rates were wage rates for "heavy and highway construction." Defendant further expressly denies that wage rates for equipment operators on "heavy and highway construction" had been omitted from the Secretary of Labor's Decision No. R-13,689, and avers that Decision No. R-13,689 omitted only the listing of wage rates for power equipment operators under "Highway Construction."

Except as stated above, defendant here incorporates by reference its original answer to the petition.

Wherefore, defendant prays that the petition be dismissed.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General
Civil Division

EDNA P. GOLDBERG
Attorney, Civil Division
Department of Justice

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON 25, D. C.

Eng C&A Board Decision No. 1372

Before the Corps of Engineers Claims and Appeals Board

Appeal of

NELLO L. TEER COMPANY

Under Contract No. DA-36-109-CIVENG-57-205

Decision on Motion to Dismiss

The Government has moved this Board to dismiss for lack of jurisdiction the appeal of Nello L. Teer Company from a dispute with the contracting officer as to the proper classi-

fication of certain power equipment operators employed by appellant in connection with Contract No. DA-36-109-CIVENG-57-205 for the construction of Embankment, Spillway, and Completion of Outlet Works (Schedule A) at Bear Creek Reservoir, Lehigh River, Pennsylvania.

The issue involved a determination by the contracting officer that all power equipment operators were to be paid at the rate prescribed for each operator under the classification of "Building and Heavy Construction," while the appellant in essence contends that the revised wage classification schedule did not contain a listing for power operators under the classification of "Heavy and Highway Construction," which it insists is the proper categorization of the work.

The contractor acting upon its asserted position that the wage determinations did not contain a listing for power equipment operators, submitted to the resident engineer Eng. Form 1581, Request for Authorization of Additional Classification and Rate. This request was based on the existing agreement with the United Construction Workers, the collective bargaining agent. The contracting officer, however, equally consistent in his views, denied the request on the ground that the "additional classifications" were either already contained in the wage determination schedules or could be reclassified in conformity therewith.

No reconciliation of views having been accomplished after a series of conferences, the contractor on 14 June 1957 appealed to this Board from what was termed

> • • • • the decision of the contracting officer • • • whereby he declines to grant, in accordance with Paragraph SC-17(b) of the contract, authority to establish rates for classifications not included in the Department of Labor determination No. R-13,689 dated 11 March, 1957 • • •.

On 24 June, ten days later, the contracting officer transmitted the entire file to the Chief of Engineers with the request that the question be forwarded to the Secretary of Labor for final determination. This was done by a letter dated 30 July 1957 to the Solicitor of Labor, which stated as follows:

> A question has arisen on Contract No. DA-36-109-CIVENG-57-205 with Nello L. Teer Company whether Department of Labor Decision No. R-13,689 contains the classifications and wage rates which were the subject of the contractor's request for additional classifications.
>
> Although this is not a question as to the proper classification or rates to be considered in accordance with SC-17 of the contract and Section 5.6(c) of Regulations, Part 5, the inclosed material is being referred to your office for a ruling or an interpretation pursuant to Section 5.11 of Regulations, Part 5.

By letter dated 26 August 1957, the Solicitor of Labor noted the aforementioned decision of the contracting officer to the effect that the additional classifications requested were either already contained in the wage determination schedules or could be reclassified in conformity therewith and concurred therein, on the ground that the rates contained in the applicable wage determination schedule are those prevailing in the area. Based on such decision, the contracting officer on 9 September 1957, again directed the appellant to conform with the minimum rates contained in the contract and to make restitution to all laborers and mechanics employed for all hours worked for which they were paid at a lower rate than that specified. This decision was again confirmed in a letter dated 13 September, and on 7 October the appellant again made timely appeal to this Board. In the meantime, the appellant has in fact paid the employees concerned the amounts the contracting officer has determined to be due.

The Government has now moved to dismiss the appeal for lack of jurisdiction on the following premises:

. . . . .

1. The contract by Article 6, Disputes, provides that questions of fact shall be decided by the Contracting Officer and be appealable to the Chief of Engineers and thence to the Secretary of the Army.

2. Article 6 contains an exception to the dispute procedure contained therein where the determination of the factual issues is "otherwise provided (for) in this contract."

3. Disputes over the classification or reclassification of laborers and mechanics is "otherwise provided" for in Paragraph SC-17, Rates of Wages, as follows:

> "In the event the interested parties cannot agree on the proper classification or reclassification of laborers and mechanics to be used, the question, accompanies (sic) by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for *final determination.*" (Emphasis supplied).

4. The dispute has been submitted to the Secretary of Labor and the determination of the Secretary of Labor, adverse to the Appellant's contentions, is contained in his letter dated 26 August 1957.

5. Paragraph 5.6(c) of Regulations, Part 5, Title 29, Subtitle A, Code of Federal Regulations contains the quotation from SC-17, above. Paragraph 5.11 of Regulations states that "*All questions* arising in any agency relating to the application and interpretation of regulations contained in this part and of the Davis-Bacon Act, as amended, . . . shall be referred to the Secretary of Labor for appropriate ruling or interpretation. (Emphasis supplied).

The appellant opposes the Government's motion on the ground that the dispute between it and the contracting officer as to whether the wage determination of the Department of Labor did or did not contain the applicable minimum wage rate to be paid the power operators is one properly cognizable under the Disputes article of the contract rather than under paragraph SC-17. The appellant points out that SC-17(a) merely provides that the minimum wages to be paid laborers and mechanics shall be set forth in the contract, while SC-17(b) sets up the procedure for the establishment of minimum wages for laborers and mechanics not listed in the contract. Both subparagraphs read as follows:

> SC-17 RATES OF WAGES:
>
> (a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as set forth below.
>
> (b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanies (sic) by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

The appellant argues that if the contracting officer is correct in his position that the minimum wages for power

equipment operators are set forth in the wage determinations and are therefore included in the contract, it is admitted that the appellant must pay such wages. It is only if the appellant is correct in its view that neither the wage determination nor the contract set forth the minimum wages to be paid the power equipment operators is there any occasion to utilize the procedure of SC-17(b). This type of problem, insists the appellant, is first and primarily a dispute as to whether the applicable wage rates are included in the contract and that it is not the intent of the contract that this type of dispute be referred to the Secretary of Labor for final determination.

DECISION

Admittedly, this motion raises problems on which there has been no firm resolution as yet by all of the Governmental agencies concerned. Nonetheless, we are of the opinion that a decision as to whether the power operators are to be paid at rates prescribed for "Building and Heavy Construction" or at rates to be determined as prevailing for "Highway and Heavy Construction" is more properly a decision for the Department of Labor than for this Board. A decision by this Board would obviously have no binding effect on either the Secretary of Labor or on any contractor other than the present appellant on this very appeal. Yet by its very nature a determination of the proper wages to be paid power operators in Carbon and Luzerne Counties, of Pennsylvania, should have a general application to all contractors within an area—in other words, it must literally be "prevailing"—and the responsibility to fix such a prevailing wage pattern is clearly that of the Secretary of Labor.

Our view is reaffirmed by the fact that the Secretary of Labor, in a letter dated 8 April 1957 to the Secretary of Navy has asserted the position that Regulations, Part 5 (29 CFR, Subtitle A), issued pursuant to Reorganization Plan No. 14, impose a duty on the part of all Government

agencies to submit to the Secretary of Labor all questions concerning the application of labor standard laws and provisions for appropriate ruling or interpretation, and has concluded therefrom that the making of final and conclusive determination by Contract Appeals Board would be inconsistent with the duties required of the Secretary of Labor. Both policy and logic compels a compliance with this view.

Accordingly, for the reasons stated, the Motion to Dismiss is granted and the appeal is dismissed.

Date: 17 April 1958

HAROLD F. BLASKY
Harold F. Blasky
Member of the Board

I *concur*

LEONARD L. ROTH
Leonard L. Roth
Member of the Board

I *concur*

E. MANNING SELTZER
E. Manning Seltzer
Chairman of the Board

* * * *

I certify that the foregoing is a true copy of the Engineers C&A Board Decision No. 1372, appeal of Nello L. Teer Company under Contract No. DA-36-109-eng-57-205.

Date: April 18, 1958

ELIZABETH R. ANDESTAD
Elizabeth R. Andestad
Recorder

IN THE UNITED STATES COURT OF CLAIMS

No. 274-59

(Filed March 20, 1964)

NELLO L. TEER COMPANY v. THE UNITED STATES

Report of Commissioner

To the honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

Pursuant to the order of reference in the above-entitled cause the following determination and report of the facts is submitted.

THE PARTIES

1. (a) Plaintiff is a Delaware corporation with its main office in Durham, North Carolina. For many years it has been engaged in the construction of roads, highways, dams, airports, and similar projects. It has never engaged in building construction.

(b) The contract out of which this suit arose was made with the United States Army Corps of Engineers, and involved two determinations of prevailing wages by the Secretary of Labor.

CONTRACT: PROJECT

2. (a) The contract in suit[1] was awarded to plaintiff, as the lowest bidder,[2] on April 26, 1957. It called for the construction of an embankment and spillway, and for the com-

[1] Contract No. DA-36-109-CIVENG-57-205.

[2] Plaintiff's bid was in the amount of $6,304,462.70. The Government had estimated the cost at $8,013,944.00. Six other bids ranged from $7,317,778.61 to $12,128,833.50. The intermediate amounts were: $7,336,934.00, $7,442,499.00, $8,855,415, and $10,843,119.50.

pletion of outlet works for the Bear Creek Reservoir, Lehigh River, Carbon and Luzerne Counties, Pennsylvania.

(b) Another contract,[3] for part of the outlet works, had been awarded, approximately 1 year earlier than the contract in suit, to the Gasparini Excavating Company.[4] Work on this contract was underway at the time the Secretary of Labor made his determinations of prevailing wages for the contract in suit.

PREVAILING WAGE REQUIREMENT

3. (a) The Davis-Bacon Act[5] requires the payment of wages "computed at * * * rates not less than those stated in the advertised specifications" as having been "determined by the Secretary of Labor to be prevailing * * * on projects of a character similar to the contract work *in the city, town, village, or other civil subdivision of the State* * * *." [Emphasis supplied.]

(b) Article 20 of the General Provisions of Construction Contracts[6] required the payment of wages at "rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof * * *."[7]

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[3] Contract No. DA-36-109-CIVENG-56-146.

[4] The contract amount was $742,176.60.

[5] 40 U.S.C. 276a.

[6] Standard Form 23A, of March 1953, prescribed by the General Services Administration, General Regulation No. 13. Cf. 41 U.S.C. Appendix, § 54.13, Art. 17.

[7] Following is more of the text of Article 20 of the General Provisions: "(a) All mechanics and laborers employed or working directly upon the site of the work will be paid * * * the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be

(c) Paragraph SC-17 of the Special Conditions of the contract provided as follows:

SC-17 RATES OF WAGES:

(a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as set forth below.

(b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreeemnt between the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanies [sic] by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

PREVAILING WAGE DETERMINATIONS

4. (a) The contract requirements which were attached to the invitation for bids as originally issued contained De-

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alleged to exist between the Contractor or subcontractor and such laborers and mechanics; • • • (b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby. • • • "

partment of Labor Wage Decision No. R-10,416, dated January 17, 1957. A copy of this wage decision appears in the Appendix hereto as Exhibit A.

(b) Prior to bid opening, a new wage rate determination, Department of Labor Wage Decision No. R-13,689, dated March 11, 1957, was distributed to all prospective bidders as Addendum No. 1 (dated March 18, 1957) to the previously issued contract specifications and as a replacement for the original wage rate decision. In submitting its bid, plaintiff acknowledged receipt of Addendum No. 1. A copy of Wage Decision No. R-13,689 appears in the Appendix hereto as Exhibit B.

(c) The similarities and differences between the two wage decisions, insofar as material to this action, were as follows:

Decision No. R-10,416 listed, in its opening section, only carpenters and carpenters' apprentices in Carbon County.

Decision No. R-13,689, likewise limited its opening section to Carbon County, but listed 15 kinds of laborers and mechanics in addition to carpenters.

The second section of Decision No. R-10,416 listed 70 kinds of laborers and mechanics, without mention of the county. The third section of Decision No. R-13,689 was identical to the second section of the earlier decision.

The second section of Decision No. R-13,689 contained an apprentice schedule for Luzerne County, listing 12 crafts. The same 12 crafts were listed in the third section of Decision No. R-10,416, but without limitation to Luzerene County.

The fourth section of Decision No. R-10,416 carried the heading "Heavy and Highway Construction," under which was a listing of carpenters and 13 categories of laborers. There was no specification of county. A fifth section of this decision carried the heading "Free Air Tunnels and Rock Shafts," under which were listed 12 crafts.

The fifth section of Decision No. R-13,689 carried the heading "Heavy and Highway Construction," under which were listed the same crafts as were in section four of the earlier decision. The heading "Free Air Tunnels and Rock Shafts" was then subordinated to "Heavy and Highway Construction" in the fifth section of Decision No. R-13,689, while the listing of crafts under the subheading remained the same.

The sixth section of Decision No. R-10,416 carried the heading "Building and Heavy Construction," under which was listed "Power equipment operators" followed by 35 separate crafts. The fourth section of Decision No. R-13,689 was identical to the sixth section of the earlier decision.

The seventh section of Decision No. R-10,416 carried the heading "Highway Construction," under which was listed "Power equipment operators" followed by 27 crafts. Decision No. R-13,689 omitted this section altogether.

(d) No point has been made in this case as to the specification or lack of specification of a particular county. Both decisions were made applicable to the project and contract in suit and applied to Carbon and Luzerne Counties.

(e) No point has been made in this case as to the listing of crafts, except as to listings under power equipment operators. It is to be noted (1) that neither decision listed power equipment operators under the heading "Heavy and Highway Construction"; (2) that the rates for power equipment operators listed under "Highway Construction" in Decision No. R-10,416 were (*a*) lower than the rates for power equipment operators listed under "Building and Heavy Construction" and (*b*) quite similar to the rates contained in plaintiff's union contract; and (3) that the elimination of the "Highway Construction" category from Decision No. R-13,689 accentuated this difference.

BASIS OF SUIT

5. (a) Plaintiff was required to pay, and did pay, to its power equipment operators employed on the project, the wages established by Wage Decision No. R-13,689 for power equipment operators in "Building and Heavy Construction."

(b) Plaintiff now sues for the difference between the wages actually paid to its power equipment operators and the lower wages it would have paid if the contracting officer had recognized such power equipment operators as having been engaged in "Heavy and Highway Construction" or in "Highway Construction."[8]

THE ISSUE

6. (a) The accuracy of the determinations by the Secretary of Labor of prevailing wages for power equipment operators, whether listed under "Building and Heavy Construction" or under "Highway Construction," is not challenged.[9]

(b) Plaintiff's challenge is directed to the applicability of the "Building and Heavy Construction" category to the contract work. Plaintiff contends that its power equipment operators were engaged in "Heavy and Highway Construction" or in "Highway Construction" (the two being identical for wage purposes, according to plaintiff) as those terms were used and understood at the locale of the work at the time of bidding; and that, since the applicable decision (No. R-13,689) contained no listing of power equipment

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[8] Plaintiff's contention is that for the purposes of its contract "Heavy Construction" and "Highway Construction" were one and the same.

[9] Discussions had in the course of pretrial proceedings between the commissioner and the attorneys for the parties recognized that determinations by the Secretary of Labor of what rates of wages were *prevailing* were final and not subject to collateral attack.

operators under either of these categories, there was an omission of pertinent crafts which the contracting officer should have recognized.

LOCALE: UNIONS

7. (a) The State of Pennsylvania has as its eastern boundary the Delaware River. Seven of the State's 67 counties border on the Delaware River, from north to south. West of this first tier of counties is a second tier which includes Carbon and Luzerne Counties, midway, from north to south.

(b) At times material to this action, two labor unions representing power equipment operators were active in that portion of Pennsylvania which includes Carbon and Luzerne Counties. One was the United Construction Workers, Division of District 50, affiliated with the United Mine Workers. It is hereinafter referred to as District 50.[10] The other union was Local 542 of the International Union of Operating Engineers, affiliated with the American Federation of Labor. It is hereinafter referred to as the AFL Operating Engineers.[11]

(c) Each of these unions recognized the division of the State of Pennsylvania into regions or districts, marking geographical areas of their several jurisdictions.

District 50 began with the State of Pennsylvania as a geographic entity and divided it into 7 groups of counties. Carbon and Luzerne Counties were in Group 7, which covered 44 counties, an area which included all of the 29-

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[10] District 50 was organized along the lines of an industrial union. Its membership and representation included laborers, carpenters, and truck drivers, as well as operators of power equipment.

[11] The AFL Operating Engineers was a craft union. Its membership and representation were limited to power equipment operators.

county area of the AFL Operating Engineers as hereinafter described.

The AFL Operating Engineers lumped into one large geographic area the State of Delaware and the eastern half (34 counties) of Pennsylvania, known to it as Eastern Pennsylvania. This large area was subdivided into three parts: one for the State of Delaware; one for the 5-county area surrounding Philadelphia; and one for the 29 counties comprising the remainder of Eastern Pennsylvania.

COLLECTIVE BARGAINING BACKGROUND

8. (a) Within the areas represented by the two unions, the distinction between "building construction," "highway construction," and "heavy construction" is historical.

"Building construction" concerned the erection of shelter, and included virtually every kind of structure having a roof over it: residences, apartments, stores, offices, schools, churches.

"Highway construction" concerned the building of roads and highways, including grading and more extensive earth moving and the installation of drains, culverts, and bridges.

"Heavy construction" concerned large earthmoving and concrete or concrete and steel installations, such as dams (together with their embankments and spillways), airports, and other large undertakings not specifically related to the erection of buildings or the installation of highways.

(b) In lay terms, either building construction or highway construction could be heavy, as distinguished from light. A small house, for example, would be building construction, but not heavy building construction such as the erection of a large office building. A country road, requiring the use of graders or even a small bulldozer, would be highway construction, but not heavy highway construction such as the building of a giant turnpike.

(c) This case is not concerned with construction which might be classified as heavy work as distinguished from light. It is concerned with the conjunctive: "Building *and* Heavy Construction," or "Heavy *and* Highway Construction."

(d) The parties are agreed that the work required by the contract in suit was "Heavy Construction." They divide over the question as to whether the power equipment operators were properly classified as "Building and Heavy," as defendant contends, or should have been classified as "Heavy and Highway" (or simply as "Highway"), as plaintiff contends. The distinction between these two categories had its origin in collective bargaining.

9. (a) Historically, the various AFL unions engaged in construction work in Pennsylvania inserted in their collective bargaining contracts (1) definitions of building construction, highway construction, and heavy construction and (2) scales of wages applicable to each category.

(b) By 1956-57 (the period material to this action), the AFL Operating Engineers had made some headway in a protracted and persistent effort to equate wage rates for Heavy Construction with wage rates for Building Construction, the latter having been, traditionally, the higher of the two.

(c) District 50, on the other hand, was not contesting the field of Building Construction with the AFL unions, but confined itself to the fields of Heavy Construction and Highway Construction. For these two categories, District 50's rates for power equipment operators were identical, and those rates were closely comparable to the AFL Operating Engineers' rates for Highway Construction.

10. (a) The effort of the AFL Operating Engineers to equate the rates for power equipment operators engaged in Heavy Construction with the rates payable for Building

Construction was begun in 1948 or 1949 in the 5-county area around Philadelphia. Considerable progress was made in inducing contractors to accept the category of Building and Heavy Construction, particularly when the heavy construction pertained to the extensive excavations incident to the erection of large buildings.

(b) Around 1955, the AFL Operating Engineers extended into the 29-county area of Eastern Pennsylvania the effort to induce contractors with the union to accept the category of Building and Heavy Construction without regard to the relation of the work to building construction, so long as the work was heavy construction as distinguished from highway construction.[13]

Some progress in this direction was made, but by 1956-57 the union had not blanketed the area of Carbon and Luzerne Counties with the higher rate.

11. (a) The Associated Pennsylvania Constructors is a trade association of contractors engaged in Highway Construction and Heavy Construction.[15] Its members did not engage in Building Construction. The membership of the association in the 34 counties of (the AFL's) Eastern Pennsylvania was approximately 40 percent District 50,[14] 30 percent AFL, and 30 percent nonunion.

(b) The members of the Associated Pennsylvania Constructors negotiated a statewide master contract with District 50. This contract had differing wage rates for each of the 7 groups of counties, but within a given group, District

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[13] Wage rates for highway construction, including power equipment operators engaged therein, remained lower than the rates demanded for power equipment operators engaged in Building Construction or Heavy Construction.

[15] Plaintiff was a member of the Associated Pennsylvania Constructors.

[14] Plaintiff was a District 50 Contractor.

50's wage rates for Highway construction and for Heavy construction were the same.

CONSTRUCTION WORK IN CARBON AND LUZERNE COUNTIES

12. (a) Construction work underway in Carbon and Luzerne Counties during 1956 and early 1957 was predominantly (in terms of volume) Highway Construction. Heavy Construction (involving dams and bridges) was second in volume. No Building Construction (involving heavy work) has been identified as having been underway in 1956-57.

(b) The major highway project was the construction of the Northeastern Extension of the Pennsylvania Turnpike, which passed within a few miles of the Bear Creek project. Approximately 40 miles of turnpike were constructed in the two counties, the work being performed by seven different contractors. More than 35 miles were constructed by companies under contract with District 50, while less than 3 miles were constructed by AFL contractors. The rates of wages paid to all employees on these projects, AFL or District 50, were the rates payable for Highway Construction.

(c) In the fall of 1955, a hurricane caused substantial flood damage in the area, as a result of which construction amounting to several millions of dollars was undertaken in the two counties during 1956 and 1957. Construction of dams and bridges was involved, as were channel changes caused by flood erosion. Some 40 or 50 contractors took part in this work. Some of them were under contract with the AFL. All workmen were paid wages at the rates for Highway Construction, although much of the work done was Heavy Construction.

(d) Two dam construction projects were underway in Carbon and Luzerne Counties just prior to and at the time of the bidding on the contract in suit. One was the Forest Dam and Reservoir project of the City of Bethlehem Water Authority. The contract was awarded in 1956, for some

$5,000,000, to Lycoming Construction Company, a District 50 contractor, which paid its power equipment operators the District 50 rates for Heavy and Highway Construction. The other project was the first Bear Creek contract for the outlet works,[15] awarded in 1956, for some $700,000, by the Corps of Engineers to the Gasparini Construction Company, an AFL contractor, which paid its power equipment operators the AFL Operating Engineers' rates for Building and Heavy Construction.

(e) The predominant practice in Carbon and Luzerne Counties during 1956 and early 1957 was that workmen, including power equipment operators, employed in Heavy Construction, and those engaged in Highway Construction, were paid at the same scale of wages being the scale established by the AFL for Highway Construction and the scale established by District 50 for Heavy and Highway Construction.

NARRATIVE

13. (a) On January 11, 1957, the Corps of Engineers requested the Department of Labor to make a "determination of the wage rates to be paid laborers and mechanics" on the "construction of embankment, spillway, tower, etc., at Bear Creek Reservoir" for the "entire schedule" of crafts, in contemplation of the invitation for bids on the contract in suit.

(b) The Department of Labor responded on January 17, 1957, with Wage Decision No. R-10,416 (set forth in the Appendix as Exhibit A).

(c) On March 1, 1957, the Corps of Engineers issued the invitation for bids[16] "for construction of embankment and spillway and completion of outlet works for Bear Creek

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[15] Cf. finding 2(b).

[16] No. CIVENG 36-109-57-92.

Reservoir, Lehigh River, Pennsylvania," which incorporated Wage Decision No. R-10,416 as part of Paragraph SC-17 of the Special Conditions.

14. (a) Plaintiff had been engaged in the construction of dams and highways in Pennsylvania, intermittently, for more than 20 years. Plaintiff's president had participated, on at least two occasions within recent years, in the negotiation of labor contracts by members of the Associated Pennsylvania Constructors.

(b) Prior to bidding the subject work, plaintiff's president and members of its engineering estimating staff made an inspection of the project site and of general and local conditions, including the availability of labor, working rules, wage practices, and prevailing wages. They concluded that at the project site, laborers and mechanics, including power equipment operators, engaged in Heavy Construction or in Highway Construction were paid a uniform scale of wages, which was lower than the scale of wages sometimes paid to the same laborers and mechanics, particularly power equipment operators, when engaged in the Heavy Construction work incidental to Building Construction.

(c) Plaintiff's bid was prepared on the basis of the foregoing determinations.

15. (a) On March 6, 1957, the Corps of Engineers requested the Department of Labor to make another wage determination for the project. In the request, the Corps of Engineers certified to the Department of Labor that no highway type work requiring the use of power equipment would be involved.[17]

(b) The Department of Labor responded on March 11, 1957, with Wage Decision No. R-13,689 (set forth in the Appendix as Exhibit B).

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[17] This certification was in error. A minor portion of the project work was highway-type construction.

(c) On March 18, 1957, the Corps of Engineers issued Addendum No. 1 to the invitation for bids, substituting Wage Decision No. R-13,689 for Wage Decision No. R-10,416, and directing bidders to acknowledge its receipt prior to the opening of bids.

16. (a) On April 9, 1957, plaintiff submitted its bid.[18]

(b) The bids were opened on that day, April 9, 1957.

(c) The contract was awarded to plaintiff on April 26, 1957.

17. (a) On April 30, 1957, plaintiff entered into a contract with District 50 covering the Bear Creek project and establishing wage rates for power equipment operators identical with the rates then in force through the master contract between the union and the Associated Pennsylvania Constructors.

(b) The project-contract with District 50 listed 3 "classes" of equipment operators, covering 25 separate crafts, with hourly wage rates ranging from $1.95 to $2.75.

18. (a) On May 14, 1957, at a preconstruction conference, plaintiff's representative informed defendant's area engineer that plaintiff intended to utilize rates and classifications of labor which (plaintiff said) were not included in the contract.

(b) On May 15, 1957, plaintiff wrote to defendant's resident engineer enclosing "* * * Form 1581, requesting authorization of additional classifications and rates for laborers and mechanics * * *," and a copy of its contract with District 50.

(c) Form 1581 was a standard form for use in requesting authorization of additional classifications and rates, as contemplated by subparagraph (b) of Paragraph SC-17 of

[18] At the appropriate place therein, plaintiff acknowledged receipt of Addendum No. 1.

the Special Conditions. In lieu of a listing on the face of the form of classifications and rates requested, plaintiff attached 2 sheets whereon were listed 32 occupations or crafts, with the rates payable, all under the heading "Heavy and Highway construction."

19. (a) By letter dated May 23, 1957, the contracting officer denied plaintiff's request for authorization, stating:

• • • • •

> A review of your submittal indicates that the so-called additional classifications you are requesting are either already contained in Department of Labor Decision No. R-13,689, which is part of your contract, or that they can be reclassified conformably to such decision, in accordance with the procedure set forth in paragraph SC-17 of the contract. Since you are, in effect, requesting a reduction in the applicable minimum rates, rather than additional classifications, your request is denied.
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> • • • • •
>
> The wage rates set forth in your contract have been determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality and are the minimum rates which must be paid. If you feel that such rates are not in accord with the prevailing area practice, it is suggested that you present the matter to the Secretary of Labor for his decision.

(b) On May 31, 1957, plaintiff protested the position taken by the contracting officer and renewed its request for authorization:

• • • • •

> Our submittal of May 15, 1957 on your Form 1581 was made in good faith to correct what we believe was

an obvious omission in the Department of Labor Decision No. R-13,689, which is a part of our contract. It was not a request for a reduction in the applicable minimum rates because no minimum rates were set forth in Department of Labor Decision No. R-13,689 for any of the classifications contained in our schedule of May 15, 1957.

* * * Department of Labor Decision No. R-13,689 * * * appears to give some rates which are applicable to the instant contract and many other rates which obviously have no applicability whatsoever to the contract. * * *

* * * * *

We have assumed in accordance with the general practice in the industry and the practices in the area where the contract is to be performed, that the rates paid in this job would be those rates listed under the general classification of "Heavy and Highway Construction" rather than those rates listed under the general classifications of "Building," "Building Construction," or "Building and Heavy Construction." Therefore, inasmuch as the Department of Labor decision did not list under the general classification of "Heavy and Highway Construction" rates for operators of power equipment, we submitted to you, in accordance with paragraph SC-17 of the contract, rates under this general classification for the laborers and mechanics who would be operating such equipment.

The Department of Labor decision lists under the general classification of "Building and Heavy Construction" rates for a number of classifications of employees who operate power equipment. These rates, however, like some of the rates contained in the decision for laborers, carpenters, and truck drivers set forth above, obviously are not intended to apply to

this particular contract, which clearly is a contract for "Heavy and Highway Construction" work.

Before bidding on this job, and since that time, we have carefully examined the labor contracts applicable to the area in which this contract is to be performed, and have found a clear practice of treating work of this kind as "Heavy and Highway Construction." Our own agreement with the United Construction Workers, Division of District 50, United Mine Workers of America (a copy of which was attached to our submittal of May 15, 1957) bears this out. * * *

As we have pointed out above, the Department of Labor Decision No. R-13,689, dated 11 March 1957, includes duplications and inconsistencies. We think that this decision also includes no decision whatsoever with respect to the rates applicable to operators of power equipment on "Heavy and Highway Construction." Under the circumstances, we cannot proceed with the performance of this contract without being informed of your interpretation of this decision. * * *

* * * * *

To the extent that your interpretation of Department of Labor Decision No. R-13,689 requires us to pay rates higher than those contained in our contract with the United Construction Workers, we intend to protest your interpretation and to appeal therefrom in accordance with the appeal provisions of the contract. * * *

(c) On June 12, 1957, the contracting officer rejected plaintiff's argument and directed plaintiff to pay the rates listed in Wage Decision No. R-13,689.

* * * * *

It is true that Department of Labor Decision No. R-13,689, which is part of your contract, does contain

classifications which will not be used in the performance of your contract. However, those classifications which are contained therein that will be used must receive the minimum rates set forth as follows:

* * * * *

4. The rates specified for power equipment operators apply to building construction and to heavy construction.

5. The rates specified under the heading of "Heavy and Highway Construction" apply both to heavy and to highway construction.

6. Briefly summarizing the preceding two subparagraphs, the "and" in the headings "Building *and* Heavy Construction" and "Heavy *and* Highway Construction" is used as "or." Therefore, since it has been mutually agreed that the principal work covered by your contract is under the category of heavy construction, your contract does contain minimum rates for all of the power equipment operators listed in your letter as well as most of the labor classifications.

* * * * *

If you continue to disagree on the proper classification or reclassification of a particular class of laborers and mechanics, the question will be referred to the Secretary of Labor for final determination, in accordance with paragraph SC-17 b of your contract. In such case, you should submit any additional pertinent data which you feel may supplement your earlier submittals for the Secretary's review.

(d) On June 14, 1957, plaintiff replied:

* * * * *

* * * you state, in part, that "* * * since it has been mutually agreed that the principal work covered by your contract is under the category of heavy construc-

tion, your contract does contain minimum rates for all the power equipment operators * * *."

We do not agree that the work covered by this contract is under the category of "heavy construction." * * * we contend that the rates applicable to this contract fall within the general classification or category of "Heavy and Highway Construction." * * * the Department of Labor's decision No. R-13,689, * * * failed to list therein minimum wages to be paid the power equipment operators engaged in such "Heavy and Highway Construction."

* * * you disagree with our contentions in this respect. * * *

In view of the foregoing, it is apparent that there exists a dispute between the contractor and the Contracting Officer as to whether or not the Department of Labor's decision referred to above lists the minimum wages to be paid power equipment operators listed in our request for authorization of additional classifications * * *

This dispute as to whether or not the Department of Labor decision does or does not list minimum wages to be paid these power equipment operators is, in our opinion, a dispute of law and of fact which should be subject to the general dispute provisions of the contract. This is not such a dispute which is subject to the provisions of Paragraph SC-17(b) of the contract.

* * * * *

If you are correct in your position that the minimum wages for power equipment operators *are* set forth in the Department of Labor's wage decision and therefore *are* included in the contract, paragraph SC-17(a) of the contract requires that we pay these minimum wages. Only in the event that we are correct in our

opinion (that neither the Department of Labor's wage decision nor the contract sets forth the minimum wages to be paid these power equipment operators) is there any occasion to utilize the provisions of Paragraph SC-17(b) of the contract.

As stated above, it appears to be clear that the dispute between the contractor and the Contracting Officer is first and primarily a dispute as to whether or not minimum wage rates for power equipment operators are included in the Department of Labor's decision and the contract. We do not, of course, believe that the contract provides that *this dispute* shall be referred to the Secretary of Labor for final determination. In view of the foregoing, and to avoid losing our right to appeal your decision by the passage of time, we enclose herewith a copy of our appeal from your decision * * *.

In order to avoid delay and consequent extra costs in the performance of the contract, and pending our appeal, we are proceeding with the work on the project, paying those minimum wage rates of pay which *are* set forth in the contract under the general classification of "Heavy and Highway Construction" and, with respect to power equipment operators (whose applicable minimum rates we believe *are not* set forth in the contract) those rates set forth in our schedule of May 15, 1957 (form 1581). In the event that it is finally determined that the payment of the latter rates does not constitute full compliance with the terms of the contract, we will make prompt restitution to the employees involved of any sums of money due to them as wages under such a final determination.

(e) On the same day, June 14, 1957, plaintiff appealed "the decision of the Contracting Officer set forth in his

letters * * * dated May 23 * * * and June 12, 1957 * * *" to the Chief of Engineers.

20. (a) On June 24, 1957, the contracting officer requested the Chief of Engineers to seek a determination of the dispute with plaintiff by the Secretary of Labor. He enclosed a detailed statement of the origin and progress of the dispute, and concluded with the following:

13. Recommendations:

a. It is recommended that the dispute be processed under the provisions of paragraph SC-17b of the contract and paragraph 5.6(c) of Regulations, Part 5, and final determination as to proper classification and rate be made by the Secretary of Labor rather than the Chief of Engineers.

b. It is recommended that the classifications and rates set forth in Department of Labor Decision No. R-13,689 under the heading "Building and Heavy Construction" be reconfirmed as applicable to the subject contract.

14. The fact that these rates are prevailing in the area for projects of a similar nature is substantiated by the payment of such rates on the following contracts:

a. Contract No. DA-36-109-CIVENG-56-146 for the construction of the outlet works at Bear Creek Reservoir. This contract is being performed at the same location and provided for the preliminary work for the subject contract. The prime contractor is the Gasparini Excavating Co., Inc., of Peckville, Pa. and the estimated contract amount was $742,176.60.

b. Contract No. DA-36-109-CIVENG-57-198 for construction of the Dyberry Dam and Appurtenant Structures at Dyberry Creek, Wayne County, Pa. Prime contractor is Hunkin-Conkey Construction Co.

of Cleveland, Ohio and the contract is in the estimated amount of $1,645,081.02.[19]

(b) On June 26, 1957, plaintiff's attorney was informed that the dispute was being referred to the Secretary of Labor for final determination in accordance with the provisions of Paragraph SC-17 of the Special Conditions.

(c) On July 1, 1957, plaintiff's attorney protested this procedure:

* * * * * * * your letter states that:

"In accordance with the provisions of SC-17(b) of the contract the question is being referred, through the Office of the Chief of Engineers, to the Secretary of Labor for final determination."

It is respectfully requested that we be advised in further detail as soon as possible, either by you or the Office of the Chief of Engineers, of the nature of the "question" being referred to the Secretary of Labor for final determination.

The earlier correspondence on this matter indicates that the only dispute or question which has arisen thus far is predicated, on the one hand, upon the contractor's contention that the contract, properly interpreted, does not set forth the classifications and wage rates which were the subject of the contractor's request for authorization of additional classifications dated May 15, 1957, and, on the other hand, the contention of your office, expressed in your letters dated

[19] This contract (No. DA-36-109-CIVENG-57-198) was dated April 11, 1957. The executed contract was forwarded to the contractor under date of May 3, 1957. Notice to proceed was given on May 8. No power equipment operators were employed on the project before May 13, 1957.

June 12, 1957, and May 23, 1957, that the contract, properly interpreted, does contain wage rates for these "so-called additional classifications."

The dispute or question thus raised is, of course, soluble only by a determination of the proper interpretation of the contract. Such a determination clearly involves a question of law rather than a question of fact. • • •

If, therefore, the "question" which you state in your letter of June 26, 1957 will be referred to the Secretary of Labor for "final determination" is the question of law mentioned above, it is clearly *not* a "question" which is subject to final determination by the Secretary of Labor. • • •

• • • • •

Further, as pointed out in our letter of June 14, 1957, paragraph SC-17(b) of the contract relates only to the resolution of questions concerning the rates of pay of laborers and mechanics "not listed" in the contract.

Your attention is also directed to the decision of the Comptroller General—GAO; Comp. Gen. Dec. B-132044, 6/10/57, reported at 25 U.S. Law Week 2612—to the effect that the authority of the Secretary of Labor in public contract cases is limited to the investigation and determination of locally prevailing wages for laborers and mechanics to be employed in the performance of public contracts. Clearly, this limitation, as well as the provisions of SC-17(b), precludes any binding determination by the Secretary of Labor of a question of law involving the interpretation of the contract.

• • • • •

(d) On July 30, 1957, the Office of the Chief of Engineers forwarded the question to the Solicitor of Labor:

> A question has arisen * * * whether Department of Labor Decision No. R-13,689 contains the classifications and wage rates which were the subject of the contractor's request for additional classifications.
>
> Although this is not a question as to the proper classification or rates to be considered in accordance with SC-17 of the contract and Section 5.6(c) of Regulations, Part 5, the inclosed material is being referred to your office for a ruling or an interpretation pursuant to Section 5.11 of Regulations, Part 5.

21. (a) On August 26, 1957, the Solicitor of Labor, in a letter to the Chief of Engineers, concurred in the contracting officer's decision of May 23, 1957, as follows:

> * * * It appears that the contractor on the project * * * negotiated a collective bargaining agreement subsequent to the awarding of the contract and has requested permission to pay lower rates than those contained in the applicable wage determination issued under the Davis-Bacon Act for the project.
>
> Wage Determination No. R-13,689 dated March 11, 1957, is the applicable determination for the project and was made a part of the contract between the contractor and the Corps of Engineers for the construction of the project. The rates therein are prevailing in Carbon and Luzerne Counties, Pennsylvania, for the type of construction involved and are currently being paid for work at the same location being performed by another contractor.
>
> Included in the enclosures transmitted to this Office with your letter of July 30, 1957, was a copy of a letter dated May 23, 1957, from the Contracting Officer

to the contractor. In this letter the Contracting Officer stated that:

"A review of your submittal indicates that the so-called additional classifications you are requesting are either already contained in Department of Labor Decision No. R-13,689, which is a part of your contract, or they can be reclassified conformably to such decision, in accordance with the procedure set forth in paragraph SC-17 of the contract. Since you are, in effect, requesting a reduction in the applicable minimum rates rather than additional classifications, your request is denied."

Since the rates contained in Wage Determination No. R-13,689 are prevailing in Carbon and Luzerne Counties, Pennsylvania, for the type of construction involved, we concur in the views of the Contracting Officer as contained in his letter of May 23, 1957, to the contractor. The Davis-Bacon Act requires the payment of all wages due, unconditionally and not less often than once a week, computed at wage rates not less than those contained in the construction contract. In the event that the contractor continues to pay wage rates less than those contained in the contract, it will be appreciated if you will so inform this Office.

(b) On September 9, 1957, the contracting officer forwarded to plaintiff a copy of the letter from the Solicitor of Labor, with the following directions:

* * * * *

* * * you are directed to conform with the minimum rates contained in your contract immediately. Restitution is to be made to all laborers and mechanics, employed by you and/or your subcontractors, for all hours worked for which they were paid at a lower rate than that specified.

* * * * *

(c) On September 10, 1957, plaintiff's attorney wrote to the contracting officer:

• • • • •

Your letter of September 9, 1957, fails • • • to set forth minimum rates which you are directing that the Contractor and/or its subcontratcors shall pay.

The Contractor has never questioned its obligation to pay the minimum rates set forth in the contract which are properly applicable to this project, which under recognized industry practices is a project properly classified under "Heavy and Highway Construction" rather than "Building Construction" or "Building and Heavy Construction." The contract, however, contains, as the Contractor pointed out in its letter of May 31, 1957, addressed to you, duplicate and inconsistent "minimum rates." Further, the contract contains no rates whatsoever for operators of power equipment under the category of "Heavy and Highway Construction" contained on pages III-14 and III-15 of the contract.

The Contractor contends that the contract properly interpreted requires only that it pay no less than the rates set forth in the contract under "Heavy and Highway Construction" on pages III-14 and III-15 thereof. Inasmuch as the contract does not list rates for certain power equipment operators under "Heavy and Highway Construction," the Contractor, acting pursuant to SC-17(b) of the contract, sought approval of the Contracting Officer of a mutual agreement between the "Contractor and the class of labor involved" establishing rates for the classifications not listed. • • •

• • • • •

The directions contained in your letter of September 9, 1957, merely are that the Contractor "conform with the minimum rates contained in [its] contract im-

mediately," without any specificity, and without making any further response to the Contractor's letter of May 31, 1957, which requested that you be specific with respect to this matter.

• • • • •

We do not like to extend our already lengthy correspondence on this matter and thus burden your office with unnecessary work. We intend to pay, of course, whatever rates you direct that we pay. We simply request that you make your direction specific so that we can comply therewith.

(d) On September 13, 1957, the contracting officer, responding to the foregoing letter, wrote to plaintiff:

• • • • •

Your request for "additional classifications and rates" was denied so that the only minimum rates are those contained on pages III-12 through III-15 of the contract. These have been confirmed by the Solicitor of Labor as the prevailing rates for the type of construction involved and are the minimum rates which must be paid.

On the basis of a review of the payrolls submitted by you to date, it appears that you have been complying with the prescribed minimum rates for all classifications with the exception of the power equipment operators. The minimum rates for such employees are set forth on page III-14 of the contract. • • •

• • • • •

This letter and the inclosed copy of the Contracting Officer's statement submitted to the Secretary of Labor constitute my decision and findings of fact. Should you disagree with my decision, you may appeal to the Chief of Engineers. • • •

(e) On October 7, 1957, plaintiff appealed the contracting officer's decision of September 13, 1957, to the Chief of Engineers, and consolidated therewith its appeal of June 14, 1957, from the contracting officer's decision of May 23, 1957.

(f) On October 22, 1957, the Government Trial Attorney filed with the Corps of Engineers Claims and Appeals Board a motion to dismiss plaintiff's appeal for lack of jurisdiction, asserting that the disputes clause of the contract "contains an exception to the dispute procedure contained therein where the determination of factual issues is 'otherwise provided (for) in this contract,' " and—

* * * * *

3. Disputes over the classification or reclassification of laborers and mechanics is "otherwise provided" for in Paragraph SC-17, Rates of Wages, as follows:

> In the event the interested parties cannot agree on the proper classification or reclassification of laborers and mechanics to be used, the question, accompanies [sic] by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for *final determination.* [Emphasis supplied.]

4. The dispute has been submitted to the Secretary of Labor and the determination of the Secretary of Labor, adverse to the Appellant's contentions, is contained in his letter dated 26 August 1957.

5. Paragraph 5.6(c) of Regulations, Part 5, Title 29, Subtitle A, Code of Federal Regulations contains the quotation from SC-17, above. Paragraph 5.11 of Regulations states that "*All questions* arising in any agency relating to the application and interpretation of regulations contained in this part and of the Davis-Bacon Act, as amended, * * * shall be referred to the

Secretary of Labor for appropriate ruling or interpretation." [Emphasis supplied.]

• • • • •

(g) By decision dated April 17, 1968, the Corps of Engineers Claims and Appeals Board granted the Government's motion and dismissed plaintiff's appeal.

22. (a) Following are pertinent excerpts from the summary by the Corps of Engineers Claims and Appeals Board preceding its decision:

• • • • •

The issue involved a determination by the contracting officer that all power equipment operators were to be paid at the rate prescribed for each operator under the classification of "Building and Heavy Construction," while the appellant in essence contends that the revised wage classification schedule did not contain a listing for power operators under the classification of "Heavy and Highway Construction," which it insists is the proper categorization of the work.

• • • • •

The appellant opposes the Government's motion on the ground that the dispute between it and the contracting officer as to whether the wage determination of the Department of Labor did or did not contain the applicable minimum wage rate to be paid the power operators is one properly cognizable under the Disputes article of the contract rather than under paragraph SC-17. The appellant points out that SC-17(a) merely provides that the minimum wages to be paid laborers and mechanics shall be set forth in the contract, while SC-17(b) sets up the procedure for the establishment of minimum wages for laborers and mechanics not listed in the contract. • • •

The appellant argues that if the contracting officer is correct in his position that the minimum wages for

power equipment operators are set forth in the wage determinations and are therefore included in the contract, it is admitted that the appellant must pay such wages. It is only if the appellant is correct in its view that neither the wage determination nor the contract set forth the minimum wages to be paid the power equipment operators is there any occasion to utilize the procedure of SC-17(b). This type of problem, insists the appellant, is first and primarily a dispute as to whether the applicable wage rates are included in the contract and that it is not the intent of the contract that this type of dispute be referred to the Secretary of Labor for final determination.

(b) Following is the text of the Board's decision:

DECISION

Admittedly, this motion raises problems on which there has been no firm resolution as yet by all of the Governmental agencies concerned. Nonetheless, we are of the opinion that a decision as to whether the power operators are to be paid at rates prescribed for "Building and Heavy Construction" or at rates to be determined as prevailing for "Highway and Heavy Construction" is more properly a decision for the Department of Labor than for this Board. A decision by this Board would obviously have no binding effect on either the Secretary of Labor or on any contractor other than the present appellant on this very appeal. Yet by its very nature a determination of the proper wages to be paid power operators in Carbon and Luzerne Counties, of Pennsylvania, should have a general application to all contractors within an area—in other words, it must literally be "prevailing"—and the responsibility to fix such a prevailing wage pattern is clearly that of the Secretary of Labor.

Our view is reaffirmed by the fact that the Secretary of Labor, in a letter dated 8 April 1957 to the Secretary of Navy has asserted the position that Regulations, Part 5 (29 CFR, Subtitle A), issued pursuant to Reorganization Plan No. 14, impose a duty on the part of all Government agencies to submit to the Secretary of Labor all questions concerning the application of labor standard laws and provisions for appropriate ruling or interpretation, and has concluded therefrom that the making of final and conclusive determination by Contract Appeals Board would be inconsistent with the duties required of the Secretary of Labor. Both policy and logic compels a compliance with this view.

Accordingly, for the reasons stated, the Motion to Dismiss is granted and the appeal is dismissed.

RESTITUTION: DAMAGES

23. (a) Plaintiff made full restitution to the employees whose wages had been computed at the lower union contract rates rather than at the minimum rates set forth in Wage Decision No. R-13,689, and thereafter paid its power equipment operators wages computed at the rates set forth in Wage Decision No. R-13,689.

(b) If plaintiff is entitled as a matter of law to recover, the measure of damages should be the difference between the wages actually paid by it to its power equipment operators, computed at the rates in Wage Decision No. R-13,689, and the lower wages it would have paid these employees if it had been permitted to apply the union contract rates.

(c) The parties have agreed that the amount of this difference is $163,384.37.

CONCLUSIONS

24. Plaintiff has exhausted its administrative remedies.[20]

25. The certification by the Corps of Engineers to the Department of Labor, in the request for the second wage determination, that no power equipment operators would be employed on the project in highway-type work, was both inaccurate and misleading. A minor portion of the project work was highway-type work. Under the circumstances existing in Carbon and Luzerne Counties at the time, Highway Construction and Heavy Construction were more nearly synonymous in labor and wage parlance than were Building Construction and Heavy Construction.

26. (a) At the dates of issuance of both Wage Decisions, and at the time plaintiff's bid was submitted, the classification of Heavy and Highway Construction, as a category for the employment of power equipment operators, was well known in Carbon and Luzerne Counties. This classification was better known to more contractors and accounted for the employment of more power equipment operators in that area than was true of the classification known as Building and Heavy Construction.

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[20] Pursuant to the pretrial agreement that evidence would not be offered or received which tended to go into the mental processes by which the Secretary (Solicitor) of Labor arrived at his determination of *prevailing* wages, the evidence is barren of reasons for the failure of both the Corps of Engineers and the Department of Labor ever to consider the factual dispute which lies at the heart of this controversy, viz, were the majority of power equipment operators employed on similar projects in Carbon and Luzerne Counties paid the rates for Building and Heavy Construction or the rates for Heavy and Highway (or Highway, unmodified) Construction? Such evidence as there is reflects a confusing picture of erroneous representation to the Department of Labor by the Corps of Engineers followed by firm determination on the part of both agencies to perpetuate the error by alternately relying on the deferring to the pronouncements of each other.

(b) The power equipment operators required by the project named in plaintiff's contract were available under the classification and at the rates of Heavy and Highway Construction.

(c) Plaintiff's interpretation of the Wage Decision as reflecting omission of power equipment operators for Heavy and Highway Construction was a reasonable interpretation.

Respectfully submitted,

W. NEY EVANS, *Commissioner.*

[The Appendix to the Report of the Commissioner has been omitted. It consists of Exhibit A and Exhibit B, the same exhibits contained in the Appendix to the Opinion of the Court of Claims, printed at pp. 104a-111a, *infra.*]

IN THE UNITED STATES COURT OF CLAIMS

No. 274—59

(Decided July 16, 1965)

NELLO L. TEER COMPANY v. THE UNITED STATES

Paul M. Rhodes for plaintiff. *Joseph C. Wells*, attorney of record, and *Lawrence T. Zimmerman* of counsel.

James F. Merow, with whom was *Assistant Attorney General John W. Douglas* for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE and DAVIS, *Judges*, and WHITAKER, *Senior Judge*.

Opinion

DURFEE, *Judge*, delivered the opinion of the court:

This action is maintained by a successful contractor of a reservoir project. The dispute involves the determination of the question of whether or not plaintiff was rightfully required to pay rates of wages to power equipment operators under a wage determination by the Department of Labor, that were higher than the wage rates plaintiff believed should be paid.

The contract out of which this suit arose was made with the United States Army Corps of Engineers and was awarded to plaintiff as lowest bidder on April 26, 1957. It called for the construction of an embankment and spillway, and for the completion of outlet works for the Bear Creek Reservoir, Lehigh River, Carbon and Luzerne Counties, Pennsylvania.

The following brief history of union and bargaining activity and construction work in this geographical area, prior to the date of the contract, blends in with this controversy.

Prior to the award of the contract, two labor unions representing power equipment operators were active in that portion of Pennsylvania which includes Carbon and Luzerne Counties. One of these was an industrial union affiliated with the United Mine Workers, and will be referred to as District 50. The other was a craft union affiliated with the American Federation of Labor, and will be referred to as the AFL Operating Engineers.

Historically, there were three types of construction in the area represented by these unions, "Building Construction," "Highway Construction" and "Heavy Construction." "Building Construction" concerned the erection of shelters and included virtually every kind of a structure having a roof over it. "Highway Construction" concerned the building of roads and highways, including grading and more extensive earth moving, and the installation of drains, culverts and bridges. "Heavy Construction" concerned large earthmoving and concrete or concrete and steel installations, such as dams (including embankments and spillways), airports and other large undertakings not related to the other two categories.

By 1956-1957 the AFL Operating Engineers Union had made some headway in an effort to equate wage rates for Heavy Construction with wage rates for the traditionally higher Building Construction. However, the union had not blanketed the Carbon and Luzerne Counties area with the higher rate. District 50, the United Mine Workers affiliate union, confined itself to the fields of Heavy Construction and Highway Construction. For these two categories, District 50's rates for power equipment operators were identical and

were comparable to the AFL Operating Engineers' rates for Highway Construction.[1]

It was the predominant practice in the two county area to pay workmen, including power equipment operators employed in Heavy Construction, and those engaged in Highway Construction, wages according to the wage scale established by the AFL for Highway Construction, and the scale established by District 50 for Heavy and Highway Construction. There was, however, a dam project in the area where power equipment operators were paid the higher AFL rates for Building and Heavy Construction. This project was the first Bear Creek contract for the outlet works which was awarded in 1956 to the Gasparini Construction Company, an AFL contractor.

With this background in mind we turn to the facts of this controversy. On January 11, 1957, the Corps of Engineers requested the Department of Labor to make a "determination of the wage rates to be paid laborers and mechanics" on the construction at Bear Creek for the "entire schedule" of crafts in contemplation of the invitation for bids on the contract in suit. This was in accordance with the Davis-Bacon Act, 40 U.S.C. § 276(a) (1952 ed.) which required the payment of wages "* * * computed at * * * rates not less than those stated in the advertised specifications * * *" as having been "* * * determined by the Secretary of Labor to be prevailing * * * on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State * * *." The Department of Labor responded on January 17, 1957, with Wage Decision No. R-10,416. The invitation for bids on the contract was issued on March 1, 1957 by the Corps of Engineers. Wage Decision No. R-10,416 was incorpor-

[1] District 50 had negotiated a master contract with the Associated Pennsylvania Constructors, a trade association engaged in Highway and Heavy Construction. Plaintiff was a member of Associated Pennsylvania.

ated as part of Paragraph SC-17[2] of the Special Conditions.

On March 6, 1957, the Corps of Engineers requested the Department of Labor to make another wage determination for the project. In the request, the Corps of Engineers certified to the Department of Labor that no highway type work requiring the use of power equipment would be involved. This certification was in error, as in actuality a minor portion (4 percent) of the project work was highway-type construction. The Department of Labor responded on March 11, 1957, with Wage Decision No. R-13,689. On March 18, 1957, the Corps of Engineers issued Addendum No. 1 to the invitation for bids, substituting Wage Decision No. R-13,689 for Wage Decision No. R-10,416, and directing bidders to acknowledge its receipt prior to opening of bids.

The similarities and differences of these two wage decisions pertinent to the problem in the case at bar are as follows: (a) Both had sections under the heading "Heavy

---

[2] Paragraph SC-17 of the Special Conditions of the contract provided as follows:

SC-17 RATES OF WAGES:

(a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as set forth below.

(b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanies [sic] by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

and Highway Construction." Neither decision listed power equipment operators under this heading; (b) Both had sections entitled "Building and Heavy Construction," under which were listed "power equipment operators" followed by 35 separate crafts. These sections were identical; (c) A section of the first decision, Decision No. R-10,416, carried the heading "Highway Construction" under which was listed "power equipment operators" followed by 27 crafts. Decision No. R-13,689 omitted this section; (d) The rates for power equipment operators under "Highway Construction" in Decision No. R-10,416 were lower than rates for power equipment operators listed under "Building and Heavy Construction."

Prior to submitting its bid plaintiff's president and engineers inspected the work site and made an inspection of working conditions, labor practices and prevailing wages. They reasonably concluded that power equipment operators engaged in the type of work called for in the project, "Heavy Construction" work[2] were to be paid a rate of wages lower than the scale of wages sometimes paid to the same operators when engaged in the Heavy Construction work incidental to Building Construction. Plaintiff's bid was prepared on the basis of the foregoing. The bid was submitted on April 9, 1957. At the appropriate place therein, plaintiff acknowledged receipt of Addendum No. 1. The contract was awarded to plaintiff on April 26. On April 30, plaintiff entered into a contract with District 50, establishing wage rates for power equipment operators identical with the rates for "Heavy and Highway Construction" then in force through the master contract between the union and Associated Pennsylvania Constructors (see footnote 1).

Thereafter, the controversy arose. Plaintiff maintained that the applicable class of power equipment operators

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[2] The parties are agreed that the work required by the contract in suit was "Heavy Construction."

had been omitted from Wage Decision No. R-13,689. Plaintiff contended that the power equipment operators should be paid under the heading "Heavy and Highway Construction."[4] Plaintiff made a request for authorization of additional classifications and rates, as contemplated by subparagraph (b) of Paragraph SC-17 of the Special Conditions. (see footnote 2). The contracting officer denied the request by letter of May 23, 1957, stating that plaintiff was in effect requesting a reduction in the applicable minimum rates, rather than additional classifications.

Plaintiff replied to the contracting officer, stating that it had assumed, in accordance with the general practices of the industry, that the applicable rates would be those under "Heavy and Highway" and not "Building and Heavy." Plaintiff, therefore, believed there was an omission as contemplated by paragraph SC-17(b) of the Special Conditions. The contracting officer rejected the argument, and directed plaintiff to pay the power equipment operators the rates listed under the heading "Building and Heavy Construction." Plaintiff was advised that if it continued to disagree, the question would be submitted to the Secretary of Labor for final determination in accordance with Paragraph SC-17(b) of the contract. Plaintiff then replied to the contracting officer that it continued to disagree, and further, that Paragraph SC-17(b) was not applicable to the dispute at hand, the dispute being whether or not there was an omission from the Wage Decision of the wages to be paid the power equipment operators. It was plaintiff's initial position that Paragraph SC-17(b) would be applicable only if both parties agreed there was no determination of the minimum wages included in the Wage Decision. Plaintiff maintained this dispute was subject to the general disputes provision of

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[4] As will be remembered, neither the first nor second wage decision had any power equipment operators listed under that heading.

the contract, and therefore, appealable to the Corps of Engineers and not the Secretary of Labor. Plaintiff therefore appealed the decision to the Chief of Engineers.

The contracting officer then wrote the Chief of Engineers recommending that the dispute be processed under the provisions of Paragraph SC-17(b) of the contract and Paragraph 5.6(c) of the Regulations, Part 5, and final determination be made by the Secretary of Labor. Plaintiff vigorously objected to this recommendation.

The Office of the Chief of Engineers forwarded the question to the Solicitor of Labor. The letter of July 30, 1957 read as follows:

> A question has arisen * * * whether the Department of Labor Decision No. R-13,689 contains the classification and wage rates which were the subject of the contractor's request for additional classifications.
>
> Although this is not a question as to the proper classification or rates to be considered in accordance with SC-17 of the contract and Section 5.6(c) of Regulations, Part 5, the enclosed material is being referred to your office for a ruling or an interpretation to Section 5.11 of Regulations, Part 5.

By letter of August 26, 1957, the Solicitor of Labor concurred in the contracting officer's decision of May 23, 1957. Plaintiff was then directed by the contracting officer to pay the higher rates, i.e., the rates for power equipment operators listed under the heading "Building and Heavy Construction."

Plaintiff then appealed to the Chief of Engineers. The Corps of Engineers Claims and Appeals Board dismissed the case on the ground that the dispute in question was solely within the province of the Secretary of Labor.

Plaintiff has made full restitution to the employees whose wages had been computed at the lower union contract rates

for "Highway and Heavy Construction" rather than at the minimum rates set forth in Wage Decision No. R-13,689 for "Building and Heavy Construction." Plaintiff now seeks recovery of the difference between the wages actually paid by it to its power equipment operators and the lower wages it would have paid these employees if it had been permitted to apply the rates it agreed to pay the union.

The question before us—the ultimate issue in the case—is whether or not the Secretary of Labor made a determination of the rates to be paid to power equipment operators under the contract. We believe that there was such a determination; that it was embodied in Wage Decision R-13, 689 which was made a part of the contract; that under *United States* v. *Binghamton Construction Co.*, 347 U.S. 171 (1954), we cannot review the correctness of the determination, and therefore that plaintiff was rightfully required to pay the operators the rates listed under the heading "Building and Heavy Construction."

Plaintiff contends the power and equipment operators were engaged in "Heavy and Highway Construction" or in "Highway Construction," (the two being identical for wage purposes according to plaintiff), as those terms were understood at the locale of the work at the time of the bidding. Plaintiff therefore emphasizes the fact that the Corps of Engineers erroneously certified to the Department of Labor in requesting the second wage decision that no highway work requiring the use of power equipment would be used. As a result of the certification, the heading "Highway Construction," (which contained rates for power equipment operators) was deleted from the second wage decision. Plaintiff concludes that since there was no classification of power operators under the heading "Heavy and Highway Construction" in the second wage decision, and since the heading "Highway Construction" which contained a classification for power operators had been deleted, then there was an omission of power operators under the second wage decision.

While this argument seems plausible at first glance, it must be remembered that even though the terms "Highway Construction" and "Heavy Construction" were more *nearly* synonymous in labor parlance in the two-county area than the terms "Heavy Construction" and "Building Construction," the fact remains that plaintiff consistently[5] took the position that the omission occurred under the heading "Heavy and Highway Construction." Plaintiff never attacked the propriety of deleting the "Highway Construction" heading which contained a listing for the power equipment workers. It is true that under plaintiff's union contract, the District 50 rates for power operators were the same for both "Highway" and "Heavy," and that it was the predominant practice in the area to pay the lower scale to power equipment operators. However, these facts should not obfuscate the fact that in *neither* the first nor second wage decision was there any classification for power equipment operators under the heading "Heavy and Highway Construction." Plaintiff has not contended that the deleted "Highway" rates were the rates that should have been paid the operators under the contract. The rates plaintiff sought to apply,—the union rates,—were similar to the deleted "Highway" rates contained in the first wage decision, but were not identical. We therefore fail to see how the omission of the heading "Highway Construction," even though erroneously made, affects plaintiff's contention that there was an omission of power equipment operators under the heading "Heavy and Highway Construction" in the second wage decision.

Our belief that there was a determination of rates for power equipment operators by the Secretary of Labor is

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[5] Finding of Fact 19(a)—Plaintiff's letter to the contracting officer, May 23, 1957: "We have assumed * * * the rates paid would be paid * * * under the general classification 'Heavy and Highway Construction' * * * *" See also Finding 19(d), plaintiff's letter of June 14, 1957, and Finding 21(c), plaintiff's letter of September 10, 1957, both of which read in the same tenor.

predicated upon our belief that the resolution of the dispute involved was within the realm of power given to the Secretary of Labor to settle wage disputes of this kind pertaining to his pre-contract wage decision. Paragraph SC-17(b) of the contract (see footnote 2) describes the applicable procedure for the resolution of such a dispute. Plaintiff contends that Paragraph SC-17(b) *is applicable* only when the *"interested parties" are unable to agree* there was an omission. According to plaintiff, the "interested parties" mean only the contractor and laborers. In other words, plaintiff reasons that Paragraph SC-17(b) comes into play only when the contractor and laborers cannot agree on a proper classification. Plaintiff says that here the contractor and the laborers were in agreement, as evidenced by the labor contract, and therefore defendant breached the contract by submitting the question of omission to the Secretary of Labor for final determination under Paragraph SC-17(b) of the contract.

We find plaintiff's construction of the term "interested parties" indeed a strained one. Plaintiff has cited us no authority for the proposition that an interested party in a Government contract does not include the Government. We cannot think of any situation where the Government would not be an interested party in one of its contracts. Further, plaintiff did not interpret *"interested parties"* in this manner in its objections to the contracting officer's ruling. At that stage of the proceedings plaintiff seemed to recognize the fact that the Government was an interested party. We therefore conclude that "interested parties" means the Government and the contractor, as applied to the facts in this case, and shall confine our discussion of Paragraph SC-17(b) to these parties.

Plaintiff's alternative argument on the construction of Paragraph SC-17(b)—the position taken before the contracting officer and the Corps of Engineers Claims and Appeals Board—will now be considered—plaintiff having failed to persuade us to adopt its interpretation of *"in-*

terested parties." Plaintiff took the position before the contracting officer and the Board that when there can be *no agreement* on the question of whether or not there was an omission from the wage decision, a dispute resolvable only under the disputes clause of the contract has arisen. Such a dispute would be appealable to the Chief of Engineers and not the Secretary of Labor. Plaintiff therefore maintained that the contract was breached when the contracting officer submitted the question of omission from the wage decision to the Secretary of Labor for final determination. We disagree with plaintiff. We do not believe there is a condition precedent, i.e., an agreement that an omission actually exists, attached to final resolution of wage disputes by the Secretary of Labor under Paragraph SC-17(b) of the contract. In other words, we believe that the Secretary of Labor had the power not only to finally decide the proper classification for omitted classes, but also the power to decide whether or not a class had been omitted. The Corps of Engineers Claims and Appeals Board was of the same opinion. (See finding 22). This approach is more than practical; it is one of common sense. If a person or a body has the authority to make a decision, who is in a better position to know whether the decision was made than that person or body? Plaintiff must therefore shoulder the burden to prove, or at least present some evidence that such a decision was not made. Since plaintiff has not done so in this case, we defer to the Secretary's ruling that the determination of rates for power equipment workers was included in the second wage decision.[6] Since the correct-

[6] Apparently, the Secretary's second wage decision (as well as his first) adopted the AFL union's nomenclature, rather than the District 50 nomenclature, and also adopted the higher wage rate which the AFL was attempting to maintain for power equipment operators engaged in heavy construction. See findings 10, 12(d), 20(a). Accordingly, we read the Secretary's decision, on referral from the Corps of Engineers, as determining that the second wage decision had included power equipment operators engaged in heavy construction (like plaintiff's) under the heading of "Building and Heavy Construction."

ness of the wage determination is not subject to judicial review, *United States* v. *Binghamton Construction Co.*, 347 U.S. 171 (1954), plaintiff is not entitled to recover.

The pertinent statutes and regulations support our interpretation of Paragraph SC-17(b) of the contract. With respect to the Davis-Bacon Act, Reorganization Plan No. 14 of 1950 [64 Stat. 1267 (1950); 5 U.S.C. § 113z-15 not (1958 ed.)] required that the Secretary of Labor "* * * shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, * * *."

As a result of the foregoing, the following Regulation was issued by the Secretary of Labor; 16 F.R. 4431-4432 (1951), [also contained in 29 CFR § 5.6 (1964 ed.)]:

> (c) Under the Davis-Bacon Act the contracting officer shall require that any class of laborers and mechanics not listed in the Secretary's decision, which will be employed on the contract, shall be classified or reclassified by the contractor or subcontractor conformably to the Secretary's decision and a report of the administrative action taken in such cases shall be transmitted by the agency to the Secretary of Labor. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for final determination. * * *

The similarity between this regulation and Paragraph SC-17(b) of the contract is quite obvious. Paragraph SC-17(b) is almost a verbatim recital of the Regulation.

The other pertinent Regulation, § 5.11, contained in the same part as § 5.6, is an all-encompassing one and reads as

follows: [16 F.R. 4432 (1951) [also contained in 29 CFR § 5.11 (1964 ed.)]]

> All questions arising in any agency relating to the application and interpretation of the regulations contained in this part and of the Davis-Bacon Act, * * * shall be referred to the Secretary of Labor for appropriate ruling or interpretation. The rulings and interpretations of the Secretary shall be authoritative * * *.

Thus, the interpretation of any regulation contained *"in this part"* [emphasis supplied] shall be referred to the Secretary of Labor for final ruling or interpretation. Therefore, § 5.6 of the Regulations promulgated by the Secretary is subject to interpretation or ruling by the Secretary. As we have shown, § 5.6 is the basis or authority for insertion of Paragraph SC-17(b) in the contract. An interpretation of § 5.6 would, therefore, be an interpretation of Paragraph SC-17(b), and within the power of the Secretary specifically under § 5.11.

It was specifically under § 5.11 that the problem at hand was forwarded by the Chief of Engineers to the Secretary, [see finding 20(d)], and under which the Secretary rendered a decision agreeing with the contracting officer.

Plaintiff has made much of the fact that the Chief of Engineers stated in the letter to the Secretary that this was not a question of the "* * * proper classification of rates to be considered in accordance with SC-17 of the contract and Section 5.6(c) of the Regulations, Part 5 * * *." Obviously, the Chief of Engineers (whose opinion was merely advisory, he having no authority to decide the problem), was partially mistaken in his interpretation of the law. In any event, the Chief of Engineers was correct in forwarding the problem to the Secretary under § 5.11, and the decision of the Secretary under § 5.11 was final. We so hold. Accordingly, plaintiff's petition is dismissed.

COWEN, *Chief Judge,* concurs in the result.

WHITAKER, *Senior Judge*, dissenting:

In the locality where the work called for in the contract in this case was to be done, there were two labor unions who employed operators of power equipment, the American Federation of Labor and the United Mine Workers. The American Federation of Labor employed them either on work which it denominated "Building and Heavy Construction" or on "Highway Construction." The United Mine Workers employed them either on what it called "Heavy and Highway Construction" or on "Highway Construction." Operators belonging to the American Federation of Labor engaged in "Building and Heavy Construction" received higher wages than those engaged in "Highway Construction." However, operators belonging to United Mine Workers received the same wages whether employed in "Heavy and Highway Construction" or in only "Highway Construction."

The work called for by the contract in this case was classified by the American Federation of Labor as "Building and Heavy Construction," but, by the United Mine Workers, as "Heavy and Highway Construction."

When the Secretary of Labor issued his original determination, he fixed the wages for these operators engaged in "Building and Heavy Construction" and in "Highway Construction," but not for "Heavy and Highway Construction." He fixed the wages for a number of the crafts and laborers engaged in "Heavy and Highway Construction," but omitted operators of power equipment, although they were necessarily employed in such work; it could not be done without them.

His second determination omitted "Highway Construction" altogether, because of the erroneous information given him that no highway construction was involved. Nor did he fix the wages for these operators engaged in "Heavy and Highway Construction."

On account of this omission, the contractor agreed with the union on the wages to be paid them, as he was authorized to do under section 17(b) of the Special Conditions, quoted in footnote 2 of the majority opinion. The contracting officer refused to approve this contract.

There was no justification for this. The reason his approval of such a contract was required was not stated, but it could only have been to insure that workers on the contract were paid the prevailing wages. There is no doubt that the wages stipulated in the contract were the prevailing wages being paid operators engaged in "Heavy and Highway Construction," if they belonged to the United Mine Workers Union, but not for American Federation of Labor operators. But the findings show that on all but one of the projects similar to the one here involved, operators belonging to the United Mine Workers were being employed and were being paid its scale of wages. On only one small project of a similar nature were American Federation of Labor operators being paid the scale for such operators engaged in "Building and Heavy Construction."

There was, therefore, no justification for the contracting officer to disapprove the contract plaintiff had made with the union. It follows that the Chief of Engineers should have reversed the contracting officer and should have approved the contract. Instead, he referred the matter to the Secretary of Labor. If there was any doubt in his mind about the wages fixed in the contract being in accord with the prevailing wages, this was the proper procedure; but I do not see how there could have been any doubt in his mind about this. But since the Secretary of Labor was the person to determine the prevailing wages, I doubt if I would be justified in saying that the Chief of Engineers was without authority to refer the matter to the Secretary of Labor. I, nevertheless, think that the Secretary of Labor's determination disregarded the facts and was based not on what actually were the prevailing wages but upon what he

thought the prevailing wages ought to be. He had no right to classify operators of power equipment engaged in work similar to the contract work as operators engaged in "Building and Heavy Construction" since, on the large majority of the work being done in this locality, operators of power equipment on similar projects were employed under the United Mine Workers' scale applicable to operators employed on "Heavy and Highway Construction." There was only one small contract in this locality on which these operators were paid the wages specified for them under "Building and Heavy Construction." To have singled out this one small contract for less than a million dollars as establishing the prevailing wages, and to have ignored the others on which many times as many contractors were involved and which involved many millions of dollars, was arbitrary and capricious. "Prevailing" means, "most frequent," "generally current."

Is such a decision final and conclusive? The majority says it was, under the decision of the Supreme Court in *United States* v. *Binghamton Construction Co.*, 347 U.S. 171 (1954). In that case the Supreme Court did say that the decision of the Secretary of Labor was not subject to judicial review, but this was not necessary to a decision of the case. It was said only in passing. The issue in the case was whether or not the contractor had a right to rely upon the determination of the Secretary of Labor that the wages fixed by him were the prevailing wages. No question was raised about the finality of the Secretary's determination. The only issue was whether or not it constituted a representation upon which the contractor had a right to rely.

The Supreme Court did not elaborate its statement that his decision was final. It merely made the statement and then passed on to a discussion of issue in the case. It did not say that his decision was final under any and all circumstances; nor do I think it meant to say so. Did it mean to say that his decision was final if it was fraudulent? Did

it mean to say that it was final if it was so grossly erroneous as to imply bad faith? Did it mean to say that it was final if it was purely arbitrary and capricious and in plain disregard of the actual facts?

This court and the Supreme Court have been continually faced with the provision in Government contracts that the decision of the contracting officer on a dispute about any matter arising under a Government contract was "final and conclusive." In cases too numerous to mention, we had held that any decision of the contracting officer which was arbitrary or capricious or not supported by substantial evidence could be reviewed by the court and, if found so to be, it could be set aside. Finally, however, the Supreme Court in *United States* v. *Wunderlich,* 342 U.S. 98 (1951), said that the decision of the contracting officer could not be set aside unless it was fraudulent, by that meaning that the contracting officer had been guilty of conscious wrongdoing. After this decision, Congress passed what was known as the Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. §§ 321-322 (1958). That Act provided that, notwithstanding the provision in Government contracts that the decision of the contracting officer was final and conclusive, it could be reviewed by the courts if fraudulent or so grossly erroneous as to imply bad faith or if arbitrary or capricious or not supported by substantial evidence.

Could the Congress have intended to give any more finality to the decision of the Secretary of Labor than to that of a contracting officer whose decision was expressly made final and conclusive, whereas there is nothing in the Davis-Bacon Act, 40 U.S.C. § 276(a) (1952 ed.), that says that the decision of the Secretary of Labor shall be final and conclusive?

Of course, there was some evidence to support the decision of the Secretary of Labor, but the Supreme Court has said that in determining whether or not there was substantial evidence to support a finding, the entire evidence

must be considered. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1950). When the entire evidence in this case is considered, as the findings show, there can be no question that the prevailing wage in this community was not that specified for the operators of power equipment under the classification of "Building and Heavy Construction" but rather that prevailing for them under the classification of "Heavy and Highway Construction," which the same as that under "Highway Construction."

Therefore, even if the Chief of Engineers had the right to refer this question to the Secretary of Labor, I still think that we are not bound by his decision since it was not supported by substantial evidence when the evidence is considered in its entirety and not merely one isolated piece of evidence.

As a result of this decision, this contractor has been required to pay many thousands of dollars more than he was due to pay had the operators of this power equipment been properly classified under "Heavy and Highway Construction" rather than under "Building and Heavy Construction."

For these reasons I respectfully dissent.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows:

THE PARTIES

1. (a) Plaintiff is a Delaware corporation with its main office in Durham, North Carolina. For many years it has been engaged in the construction of roads, highways, dams, airports, and similar projects. It has never engaged in building construction.

(b) The contract out of which this suit arose was made with the United States Army Corps of Engineers, and involved two determinations of prevailing wages by the Secretary of Labor.

CONTRACT: PROJECT

2. (a) The contract in suit[1] was awarded to plaintiff, as the lowest bidder,[2] on April 26, 1957. It called for the construction of an embankment and spillway, and for the completion of outlet works for the Bear Creek Reservoir, Lehigh River, Carbon and Luzerne Counties, Pennsylvania.

(b) Another contract,[3] for part of the outlet works, had been awarded, approximately 1 year earlier than the contract in suit, to the Gasparini Excavating Company.[4] Work on this contract was underway at the time the Secretary of Labor made his determinations of prevailing wages for the contract in suit.

PREVAILING WAGE REQUIREMENT

3. (a) The Davis-Bacon Act[5] requires the payment of wages "computed at * * * rates not less than those stated in the advertised specifications" as having been "determined by the Secretary of Labor to be prevailing * * * on projects of a character similar to the contract work *in the city, town, village, or other civil subdivision of the State* * * *." [Emphasis supplied.]

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[1] Contract No. DA-36-109-CIVENG-57-205.

[2] Plaintiff's bid was in the amount of $6,304,462.70. The Government had estimated the cost at $8,013,944.00. Six other bids ranged from $7,317,778.61 to $12,128,833.50. The intermediate amounts were: $7,336,934.00, $7,442,499.00, $8,855,415.00, and $10,843,119.50.

[3] Contract No. DA-36-109-CIVENG-56-146.

[4] The contract amount was $742,176.60.

[5] 40 U.S.C. 276a.

(b) Article 20 of the General Provisions of Construction Contracts[6] required the payment of wages at "rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof * * *."[7]

(c) Paragraph SC-17 of the Special Conditions of the contract provided as follows:

SC—RATES OF WAGES:

(a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as set forth below.

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[6] Standard Form 23A, of March 1953, prescribed by the General Services Administration, General Regulation No. 13. Cf. 41 U.S.C. Appendix, § 54.13, Art. 17.

[7] Following is more of the text of Article 20 of the General Provisions: "(a) All mechanics and laborers employed or working directly upon the site of the work will be paid * * * the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; * * * (b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby. * * *"

(b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanies [sic] by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

PREVAILING WAGE DETERMINATIONS

4. (a) The contract requirements which were attached to the invitation for bids as originally issued contained Department of Labor Wage Decision No. R-10,416, dated January 17, 1957. A copy of this wage decision appears in the Appendix hereto as Exhibit A.

(b) Prior to bid opening, a new wage rate determination, Department of Labor Wage Decision No. R-13,689, dated March 11, 1957, was distributed to all prospective bidders as Addendum No. 1 (dated March 18, 1957) to the previously issued contract specifications and as a replacement for the original wage rate decision. In submitting its bid, plaintiff acknowledged receipt of Addendum No. 1. A copy of Wage Decision No. R-13,689 appears in the Appendix hereto as Exhibit B.

(c) The similarities and differences between the two wage decisions, insofar as material to this action, were as follows:

Decision No. R-10,416 listed, in its opening section, only carpenters and carpenters' apprentices in Carbon County.

Decision No. R-13,689, likewise limited its opening section to Carbon County, but listed 15 kinds of laborers and mechanics in addition to carpenters.

The second section of Decision No. R-10,416 listed 70 kinds of laborers and mechanics, without mention of the county. The third section of Decision No. R-13,689 was identical to the second section of the earlier decision.

The second section of Decision No. R-13,689 contained an apprentice schedule for Luzerne County, listing 12 crafts. The same 12 crafts were listed in the third section of Decision No. R-10,416, but without limitation to Luzerne County.

The fourth section of Decision No. R-10,416 carried the heading "Heavy and Highway Construction," under which was a listing of carpenters and 13 categories of laborers. There was no specification of county. A fifth section of this decision carried the heading "Free Air Tunnels and Rock Shafts," under which were listed 12 crafts.

The fifth section of Decision No. R-13,689 carried the heading "Heavy and Highway Construction," under which were listed the same crafts as were in section four of the earlier decision. The heading "Free Air Tunnels and Rock Shafts" was then subordinated to "Heavy and Highway Construction" in the fifth section of Decision No. R-13,689, while the listing of crafts under the subheading remained the same.

The sixth section of Decision No. R-10,416 carried the heading "Building and Heavy Construction," under which was listed "Power equipment operators" followed by 35 separate crafts. The fourth section of Decision No. R-13,689 was identical to the sixth section of the earlier decision.

The seventh section of Decision No. R-10,416 carried the heading "Highway Construction," under which was listed "Power equipment operators" followed by 27 crafts. Decision No. R-13,689 omitted this section altogether.

(d) No point has been made in this case as to the specification or lack of specification of a particular county.

Both decisions were made applicable to the project and contract in suit and applied to Carbon and Luzerne Counties.

(e) No point has been made in this case as to the listing of crafts, except as to listings under power equipment operators. It is to be noted (1) that neither decision listed power equipment operators under the heading "Heavy and Highway Construction"; (2) that the rates for power equipment operators listed under "Highway Construction" in Decision No. R-10,416 were (*a*) lower than the rates for power equipment operators listed under "Building and Heavy Construction" and (*b*) quite similar, but not identical, to the rates contained in plaintiff's union contract.

BASIS OF SUIT

5. (a) Plaintiff was required to pay, and did pay, to its power equipment operators employed on the project, the wages established by Wage Decision No. R-13,689 for power equipment operators in "Building and Heavy Construction."

(b) Plaintiff now sues for the difference between the wages actually paid to its power equipment operators and the lower wages it would have paid if the contracting officer had recognized such power equipment operators as having been engaged in "Heavy and Highway Construction" or in "Highway Construction."[8]

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[8] Plaintiff's contention is that for the purposes of its contract "Heavy Construction" and "Highway Construction" were one and the same. Under the wage rates of plaintiff's union contract with the District 50 union they were the same. See Findings 11(b) and 17(a) *infra*. Plaintiff continually sought, however, to have the power equipment operators paid under the classification "Heavy and Highway Construction." See Findings 19(a), 19(d) and 21(c) *infra*.

THE ISSUE

6. (a) The accuracy of the determinations by the Secretary of Labor of prevailing wages for power equipment operators, whether listed under "Building and Heavy Construction" or under "Highway Construction," is not challenged.[9]

(b) Plaintiff's challenge is directed to the applicability of the "Building and Heavy Construction" category to the contract work. Plaintiff contends that its power equipment operators were engaged in "Heavy and Highway Construction" or in "Highway Construction" (the two being identical for wage purposes, according to plaintiff) as those terms were used and understood at the locale of the work at the time of bidding; and that, since the applicable decision (No. R-13,689) contained no listing of power equipment operators under either of these categories, there was an omission of pertinent crafts which the contracting officer should have recognized.

LOCALE: UNIONS

7. (a) The State of Pennsylvania has as its eastern boundary the Delaware River. Seven of the State's 67 counties border on the Delaware River, from north to south. West of this first tier of counties is a second tier which includes Carbon and Luzerne Counties, midway, from north to south.

(b) At times material to this action, two labor unions representing power equipment operators were active in that portion of Pennsylvania which includes Carbon and Luzerne Counties. One was the United Construction Workers, Division of District 50, affiliated with the United

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[9] Discussions had in the course of pretrial proceedings between the commissioner and the attorneys for the parties recognized that determinations by the Secretary of Labor of what rates of wages were *prevailing* were final and not subject to collateral attack.

Mine Workers. It is hereinafter referred to as District 50.[10] The other union was Local 542 of the International Union of Operating Engineers, affiliated with the American Federation of Labor. It is hereinafter referred to as the AFL Operating Engineers.[11]

(c) Each of these unions recognized the division of the State of Pennsylvania into regions or districts, marking geographical areas of their several jurisdictions.

District 50 began with the State of Pennsylvania as a geographic entity and divided it into 7 groups of counties. Carbon and Luzerne Counties were in Group 7, which covered 44 counties, an area which included all of the 29-county area of the AFL Operating Engineers as hereinafter described.

The AFL Operating Engineers lumped into one large geographic area the State of Delaware and the eastern half (34 counties) of Pennsylvania, known to it as Eastern Pennsylvania. This large area was subdivided into three parts: one for the State of Delaware; one for the 5-county area surrounding Philadelphia; and one for the 29 counties comprising the remainder of Eastern Pennsylvania.

Collective Bargaining Background

8. (a) Within the areas represented by the two unions, the distinction between "building construction," "highway construction," and "heavy construction" is historical.

"Building construction" concerned the erection of shelter, and included virtually every kind of structure having

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[10] District 50 was organized along the lines of an industrial union. Its membership and representation included laborers, carpenters, and truck drivers, as well as operators of power equipment.

[11] The AFL Operating Engineers was a craft union. Its membership and representation were limited to power equipment operators.

a roof over it: residences, apartments, stores, offices, schools, churches.

"Highway construction" concerned the building of roads and highways, including grading and more extensive earth moving and the installation of drains, culverts, and bridges.

"Heavy construction" concerned large earthmoving and concrete or concrete and steel installations, such as dams (together with their embankments and spillways), airports, and other large undertakings not specifically related to the erection of buildings or the installation of highways.

(b) In lay terms, either building construction or highway construction could be heavy, as distinguished from light. A small house, for example, would be building construction, but not heavy building construction such as the erection of a large office building. A country road, requiring the use of graders or even a small bulldozer, would be highway construction, but not heavy highway construction such as the building of a giant turnpike.

(c) This case is not concerned with construction which might be classified as heavy work as distinguished from light. It is concerned with the conjunctive: "Building *and* Heavy Construction," or "Heavy *and* Highway Construction."

(d) The parties are agreed that the work required by the contract in suit was "Heavy Construction." They divide over the question as to whether the power equipment operators were properly classified as "Building and Heavy," as defendant contends, or should have been classified as "Heavy and Highway" (or simply as "Highway"), as plaintiff contends. The distinction between these two categories had its origin in collective bargaining.

9. (a) Historically, the various AFL unions engaged in construction work in Pennsylvania inserted in their collective bargaining contracts (1) definitions of building con-

struction, highway construction, and heavy construction and (2) scales of wages applicable to each category.

(b) By 1956-57 (the period material to this action), the AFL Operating Engineers had made some headway in a protracted and persistent effort to equate wage rates for Heavy Construction with wage rates for Building Construction, the latter having been, traditionally, the higher of the two.

(c) District 50, on the other hand, was not contesting the field of Building Construction with the AFL unions, but confined itself to the fields of Heavy Construction and Highway Construction. For these two categories, District 50's rates for power equipment operators were identical, and those rates were closely comparable to the AFL Operating Engineers' rates for Highway Construction.

10. (a) The effort of the AFL Operating Engineers to equate the rates for power equipment operators engaged in Heavy Construction with the rates payable for Building Construction was begun in 1948 or 1949 in the 5-county area around Philadelphia. Considerable progress was made in inducing contractors to accept the category of Building and Heavy Construction, particularly when the heavy construction pertained to the extensive excavations incident to the erection of large buildings.

(b) Around 1955, the AFL Operating Engineers extended into the 29-county area of Eastern Pennsylvania the effort to induce contractors with the union to accept the category of Building and Heavy Construction without regard to the relation of the work to building construction, so long as the work was heavy construction as distinguished from highway construction.[12]

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[12] Wage rates for highway construction, including power equipment operators engaged therein, remained lower than the rates demanded for power equipment operators engaged in Building Construction or Heavy Construction.

Some progress in this direction was made, but by 1956-57 the union had not blanketed the area of Carbon and Luzerne Counties with the higher rate.

11. (a) The Associated Pennsylvania Constructors is a trade association of contractors engaged in Highway Construction and Heavy Construction.[13] Its members did not engage in Building Construction. The membership of the association in the 34 counties of (the AFL's) Eastern Pennsylvania was approximately 40 percent District 50,[14] 30 percent AFL, and 30 percent nonunion.

(b) The members of the Associated Pennsylvania Constructors negotiated a statewide master contract with District 50. This contract had differing wage rates for each of the 7 groups of counties, but within a given group, District 50's wage rates for Highway construction and for Heavy construction were the same.

CONSTRUCTION WORK IN CARBON AND LUZERNE COUNTIES

12. (a) Construction work underway in Carbon and Luzerne Counties during 1956 and early 1957 was predominantly (in terms of volume) Highway Construction. Heavy Construction (involving dams and bridges) was second in volume. No Building Construction (involving heavy work) has been identified as having been underway in 1956-57.

(b) The major highway project was the construction of the Northeastern Extension of the Pennsylvania Turnpike, which passed within a few miles of the Bear Creek project. Approximately 40 miles of turnpike were constructed in the two counties, the work being performed by seven different contractors. More than 35 miles were constructed by companies under contract with District 50, while less than 3

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[13] Plaintiff was a member of the Associated Pennsylvania Constructors.

[14] Plaintiff was a District 50 contractor.

miles were constructed by AFL contractors. The rates of wages paid to all employees on these projects, AFL or District 50, were the rates payable for Highway Construction.

(c) In the fall of 1955, a hurricane caused substantial flood damage in the area, as a result of which construction amounting to several millions of dollars was undertaken in the two counties during 1956 and 1957. Construction of dams and bridges was involved, as were channel changes caused by flood erosion. Some 40 or 50 contractors took part in this work. Some of them were under contract with the AFL. All workmen were paid wages at the rates for Highway Construction, although much of the work done was Heavy Construction.

(d) Two dam construction projects were underway in Carbon and Luzerne Counties just prior to and at the time of the bidding on the contract in suit. One was the Forest Dam and Reservoir project of the City of Bethlehem Water Authority. The contract was awarded in 1956, for some $5,000,000, to Lycoming Construction Company, a District 50 contractor, which paid its power equipment operators the District 50 rates for Heavy and Highway Construction. The other project was the first Bear Creek contract for the outlet works,[15] awarded in 1956, for some $700,000, by the Corps of Engineers to the Gasparini Construction Company, an AFL contractor, which paid its power equipment operators the AFL Operating Engineers' rates for Building and Heavy Construction.

(e) The predominant practice in Carbon and Luzerne Counties during 1956 and early 1957 was that workmen, including power equipment operators, employed in Heavy Construction, and those engaged in Highway Construction, were paid at the same scale of wages being the scale established by the AFL for Highway Construction and the scale established by District 50 for Heavy and Highway Construction.

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[15] Cf. finding 2(b).

NARRATIVE

13. (a) On January 11, 1957, the Corps of Engineers requested the Department of Labor to make a "determination of the wage rates to be paid laborers and mechanics" on the "construction of embankment, spillway, tower, etc., at Bear Creek Reservoir" for the "entire schedule" of crafts, in contemplation of the invitation for bids on the contract in suit.

(b) The Department of Labor responded on January 17, 1957, with Wage Decision No. R-10,416 (set forth in the Appendix as Exhibit A).

(c) On March 1, 1957, the Corps of Engineers issued the invitation for bids[16] "for construction of embankment and spillway and completion of outlet works for Bear Creek Reservoir, Lehigh River, Pennsylvania," which incorporated Wage Decision No. R-10,416 as part of Paragraph SC-17 of the Special Conditions.

14. (a) Plaintiff had been engaged in the construction of dams and highways in Pennsylvania, intermittently, for more than 20 years. Plaintiff's president had participated, on at least two occasions within recent years, in the negotiation of labor contracts by members of the Associated Pennsylvania Constructors.

(b) Prior to bidding the subject work, plaintiff's president and members of its engineering estimating staff made an inspection of the project site and of general and local conditions, including the availability of labor, working rules, wage practices, and prevailing wages. They concluded that at the project site, laborers and mechanics, including power equipment operators, engaged in Heavy Construction or in Highway Construction were paid a uniform scale of wages, which was lower than the scale of wages sometimes paid to the same laborers and mechanics, particularly power equip-

[16] No. CIVENG 36-109-57-92.

ment operators, when engaged in the Heavy Construction work incidental to Building Construction.

(c) Plaintiff's bid was prepared on the basis of the foregoing determinations.

15. (a) On March 6, 1957, the Corps of Engineers requested the Department of Labor to make another wage determination for the project. In the request, the Corps of Engineers certified to the Department of Labor that no highway type work requiring the use of power equipment would be involved.[17]

(b) The Department of Labor responded on March 11, 1957, with Wage Decision No. R-13,689 (set forth in the Appendix as Exhibit B).

(c) On March 18, 1957, the Corps of Engineers issued Addendum No. 1 to the invitation for bids, substituting Wage Decision No. R-13,689 for Wage Decision No. R-10,416, and directing bidders to acknowledge its receipt prior to the opening of bids.

16. (a) On April 9, 1957, plaintiff submitted its bid.[18]

(b) The bids were opened on that day, April 9, 1957.

(c) The contract was awarded to plaintiff on April 26, 1957.

17. (a) On April 30, 1957, plaintiff entered into a contract with District 50 covering the Bear Creek project and establishing wage rates for power equipment operators identical with the rates then in force through the master contract between the union and the Associated Pennsylvania Constructors.

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[17] This certification was in error. A minor portion (4 percent) of the project work was highway-type construction.

[18] At the appropriate place therein, plaintiff acknowledged receipt of Addendum No. 1.

(b) The project contract with District 50 listed 3 "classes" of equipment operators, covering 25 separate crafts, with hourly wage rates ranging from $1.95 to $2.75.

18. (a) On May 14, 1957, at a preconstruction conference, plaintiff's representative informed defendant's area engineer that plaintiff intended to utilize rates and classifications of labor which (plaintiff said) were not included in the contract.

(b) On May 15, 1957, plaintiff wrote to defendant's resident engineer enclosing "* * * Form 1581, requesting authorization of additional classifications and rates for laborers and mechanics * * *," and a copy of its contract with District 50.

(c) Form 1581 was a standard form for use in requesting authorization of additional classifications and rates, as contemplated by subparagraph (b) of Paragraph SC-17 of the Special Conditions. In lieu of a listing on the face of the form of classifications and rates requested, plaintiff attached 2 sheets whereon were listed 32 occupations or crafts, with the rates payable, all under the heading: "Heavy and Highway construction."

19. (a) By letter dated May 23, 1957, the contracting officer denied plaintiff's request for authorization, stating:

* * * * * * * * *

> A review of your submittal indicates that the so-called additional classifications you are requesting are either already contained in Department of Labor Decision No. R-13,689, which is part of your contract, or that they can be reclassified conformably to such decision, in accordance, with the procedure set forth in paragraph SC-17 of the contract. Since you are, in effect, requesting a reduction in the applicable minimum rates, rather than additional classifications, your request is denied.

* * * * * * * * *

> The wage rates set forth in your contract have been determined by the Secretary of Labor to be prevailing

for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality and are the minimum rates which must be paid. If you feel that such rates are not in accord with the prevailing area practice, it is suggested that you present the matter to the Secretary of Labor for his decision.

(b) On May 31, 1957, plaintiff protested the position taken by the contracting officer and renewed its request for authorization:

* * * * * * * * * *

Our submittal of May 15, 1957 on your Form 1581 was made in good faith to correct what we believe was an obvious omission in the Department of Labor Decision No. R-13,689, which is a part of our contract. It was not a request for a reduction in the applicable minimum rates because no minimum rates were set forth in Department of Labor Decision No. R-13,689 for any of the classifications contained in our schedule of May 15, 1957.

* * * Department of Labor Decision No. R-13,689 * * * appears to give some rates which are applicable to the instant contract and many other rates which obviously have no applicability whatsoever to the contract. * * *

* * * * * * * * * *

We have assumed in accordance with the general practice in the industry and the practices in the area where the contract is to be performed, that the rates paid in this job would be those rates listed under the general classification of "Heavy and Highway Construction" rather than those rates listed under the general classifications of: "Building," "Building Construction," or "Building and Heavy Construction," Therefore, inasmuch as the Department of Labor decision did not list under the general classification of "Heavy and Highway Construction" rates for operators of power equipment, we submitted to you, in accordance with paragraph SC-17 of the contract, rates under this general classification for the laborers and mechanics who would be operating such equipment.

The Department of Labor decision lists under the general classification of "Building and Heavy Construction" rates for a number of classifications of employees who operate power equipment. These rates, however, like some of the rates contained in the decision for laborers, carpenters, and truck drivers set forth above, obviously are not intended to apply to this particular contract, which clearly is a contract for "Heavy and Highway Construction" work.

Before bidding on this job, and since that time, we have carefully examined the labor contracts applicable to the area in which this contract is to be performed, and have found a clear practice of treating work of this kind as "Heavy and Highway Construction." Our own agreement with the United Construction Workers, Division of District 50, United Mine workers of America (a copy of which was attached to our submittal of May 15, 1957) bears this out. • • •

As we have pointed out above, the Department of Labor Decision No. R-13,689, dated 11 March 1957, includes duplications and inconsistencies. We think that this decision also includes no decision whatsoever with respect to the rates applicable to operators of power equipment on "Heavy and Highway Construction." Under the circumstances, we cannot proceed with the performance of this contract without being informed of your interpretation of this decision. • • •

• • • • • • • • • •

To the extent that your interpretation of Department of Labor Decision No. R-13,689 requires us to pay rates higher than those contained in our contract with the United Construction Workers, we intend to protest your interpretation and to appeal therefrom in accordance with the appeal provisions of the contract. • • •

(c) On June 12, 1957, the contracting officer rejected plaintiff's argument and directed plaintiff to pay the rates listed in Wage Decision No. R-13,689.

• • • • • • • • • •

It is true that Department of Labor Decision No. R-13,689, which is part of your contract, does contain classifications which will not be used in the performance of your contract. However, those classifications which are contained therein that will be used must receive the minimum rates set forth as follows:

• • • • • • • • • •

4. The rates specified for power equipment operators apply to building construction and to heavy construction.

5. The rates specified under the heading of "Heavy and Highway Construction" apply both to heavy and to highway construction.

6. Briefly summarizing the preceding two subparagraphs, the "and" in the headings "Building *and* Heavy Construction" and "Heavy *and* Highway Construction" is used as "or." Therefore, since it has been mutually agreed that the principal work covered by your contract is under the category of heavy construction, your contract does contain minimum rates for all of the power equipment operators listed in your letter as well as most of the labor classifications.

• • • • • • • • • •

If you continue to disagree on the proper classification or reclassification of a particular class of laborers and mechanics, the question will be referred to the Secretary of Labor for final determination, in accordance with paragraph SC-17b of your contract. In such case, you should submit any additional pertinent data which you feel may supplement your earlier submittals for the Secretary's review.

(d) On June 14, 1957, plaintiff replied:

• • • • • • • • • •

• • • you state, in part, that "• • • since it has been mutually agreed that the principal work covered by your contract is under the category of heavy construction, your contract does contain minimum rates for all the power equipment operators • • •."

We do not agree that the work covered by this contract is under the category of "heavy construction."

• • • we contend that the rates applicable to this contract fall within the general classification or category of "Heavy and Highway Construction." • • • the Department of Labor's decision No. R-13,689, • • • failed to list therein minimum wages to be paid the power equipment operators engaged in such "Heavy and Highway Construction."

• • • you disagree with our contentions in this respect. • • •

In view of the foregoing, it is apparent that there exists a dispute between the contractor and the Contracting Officer as to whether or not the Department of Labor's decision referred to above lists the minimum wages to be paid power equipment operators listed in our request for authorization of additional classifications • • •

This dispute as to whether or not the Department of Labor decision does or does not list minimum wages to be paid these power equipment operators is, in our opinion, a dispute of law and of fact which should be subject to the general dispute provisions of the contract. This is not such a dispute which is subject to the provisions of Paragraph SC-17(b) of the contract.

• • • • • • • • •

If you are correct in your position that the minimum wages for power equipment operators *are* set forth in the Department of Labor's wage decision and therefore *are* included in the contract, paragraph SC-17(a) of the contract requires that we pay these minimum wages. Only in the event that we are correct in our opinion (that neither the Department of Labor's wage decision nor the contract sets forth the minimum wages to be paid these power equipment operators) is there any occasion to utilize the provisions of Paragraph SC-17(b) of the contract.

As stated above, it appears to be clear that the dispute between the contractor and the Contracting Officer is first and primarily a dispute as to whether or not minimum wage rates for power equipment operators are included in the Department of Labor's decision and the contract. We do not, of course, believe that the con-

tract provides that *this dispute* shall be referred to the Secretarw of Labor for final determination. In view of the foregoing, and to avoid losing our right to appeal your decision by the passage of time, we enclose herewith a copy of our appeal from your decision * * *.

In order to avoid delay and consequent extra costs in the performance of the contract, and pending our appeal, we are proceeding with the work on the project, paying those minimum wage rates of pay which *are* set forth in the contract under the general classification of "Heavy and Highway Construction" and, with respect to power equipment operators (whose applicable minimum rates we believe *are not* set forth in the contract) those rates set forth in our schedule of May 15, 1957 (form 1581). In the event that it is finally determined that the payment of the latter rates does not constitute full compliance with the terms of the contract, we will make prompt restitution to the employees involved of any sums of money due to them as wages under such a final determination.

(e) On the same day, June 14, 1957, plaintiff appealed "the decision of the Contracting Officer set forth in his letters * * * dated May 23 * * * and June 12, 1957 * * *" to the Chief of Engineers.

20. (a) On June 24, 1957, the contracting officer requested the Chief of Engineers to seek a determination of the dispute with plaintiff by the Secretary of Labor. He enclosed a detailed statement of the origin and progress of the dispute, and concluded with the following:

13. Recommendations:

a. It is recommended that the dispute be processed under the provisions of paragraph SC-17b of the contract and paragraph 5.6(c) of Regulations, Part 5, and final determination as to proper classification and rate be made by the Secretary of Labor rather than the Chief of Engineers.

b. It is recommended that the classifications and rates set forth in Department of Labor Decision No. R-13,689 under the heading "Building and Heavy Con-

struction" be reconfirmed as applicable to the subject contract.

14. The fact that these rates are prevailing in the area for projects of a similar nature is substantiated by the payment of such rates on the following contracts:

a. Contract No. DA-36-109-CIVENG-56-146 for the construction of the outlet works at Bear Creek Reservoir. This contract is being performed at the same location and provided for the preliminary work for the subject contract. The prime contractor is the Gasparini Excavating Co., Inc., of Peckville, Pa. and the estimated contract amount was $742,176.60.

b. Contract No. DA-36-109-CIVENG-57-198 for construction of the Dyberry Dam and Appurtenant Structures at Dyberry Creek, Wayne County, Pa. Prime contractor is Hunkin-Conkey Construction Co. of Cleveland, Ohio and the contract is in the estimated amount of $1,645,081.02.[19]

(b) On June 26, 1957, plaintiff's attorney was informed that the dispute was being referred to the Secretary of Labor for final determination in accordance with the provisions of Paragraph SC-17 of the Special Conditions.

(c) On July 1, 1957, plaintiff's attorney protested this procedure:

* * * * * * * * *

* * * your letter states that:

"In accordance with the provisions of SC-17(b) of the contract the question is being referred, through the Office of the Chief of Engineers, to the Secretary of Labor for final determination."

It is respectfully requested that we be advised in further detail as soon as possible, either by you or the

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[19] This contract (No. DA-36-109-CIVENG-57-198) was dated April 11, 1957. The executed contract was forwarded to the contractor under date of May 3, 1957. Notice to proceed was given on May 8. No power equipment operators were employed on the project before May 13, 1957.

Office of the Chief of Engineers, of the nature of the "question" being referred to the Secretary of Labor for final determination.

The earlier correspondence on this matter indicates that the only dispute or question which has arisen thus far is predicated, on the one hand, upon the contractor's contention that the contract, properly interpreted, does not set forth the classifications and wage rates which were the subject of the contractor's request for authorization of additional classifications dated May 15, 1957, and, on the other hand, the contention of your office, expressed in your letters dated June 12, 1957, and May 23, 1957, that the contract, properly interpreted, does contain wage rates for these "so-called additional classifications."

The dispute or question thus raised is, of course, soluble only by a determination of the proper interpretation of the contract. Such a determination clearly involves a question of law rather than a question of fact. • • •

If, therefore, the "question" which you state in your letter of June 26, 1957 will be referred to the Secretary of Labor for "final determination" is the question of law mentioned above, it is clearly *not* a "question" which is subject to final determination by the Secretary of Labor. • • •

• • • • • • • • • •

Further, as pointed out in our letter of June 14, 1957, paragraph SC-17(b) of the contract relates only to the resolution of questions concerning the rates of pay of laborers and mechanics "not listed" in the contract.

Your attention is also directed to the decision of the Comptroller General—GAO; Comp. Gen. Dec. B-132044, 6/10/57, reported at 25 U.S. Law Week 2612—to the effect that the authority of the Secretary of Labor in public contract cases is limited to the investigation and determination of locally prevailing wages for laborers and mechanics to be employed in the performance of public contracts. Clearly, this limitation, as well as the provisions of SC-17(b), precludes any binding determination by the Secretary of Labor of a

question of law involving the interpretation of the contract.

• • • • • • • • • •

(d) On July 30, 1957, the Office of the Chief of Engineers forwarded the question to the Solicitor of Labor:

> A question has arisen • • • whether Department of Labor Decision No. R-13,689 contains the classifications and wage rates which were the subject of the contractor's request for additional classifications.
>
> Although this is not a question as to the proper classification or rates to be considered in accordance with SC-17 of the contract and Section 5.6(c) of Regulations, Part 5, the inclosed material is being referred to your office for a ruling or an interpretation pursuant to Section 5.11 of Regulations, Part 5.

21. (a) On August 26, 1957, the Solicitor of Labor, in a letter to the Chief of Engineers, concurred in the contracting officer's decision of May 23, 1957, as follows.

> • • • It appears that the contractor on the project • • • negotiated a collective bargaining agreement subsequent to the awarding of the contract and has requested permission to pay lower rates than those contained in the applicable wage determination issued under the Davis-Bacon Act for the project.
>
> Wage Determination No. R-13,689 dated March 11, 1957, is the applicable determination for the project and was made a part of the contract between the contractor and the Corps of Engineers for the construction of the project. The rates therein are prevailing in Carbon and Luzerne Counties, Pennsylvania, for the type of construction involved and are currently being paid for work at the same location being performed by another contractor.
>
> Included in the enclosures transmitted to this Office with your letter of July 30, 1957, was a copy of a letter dated May 23, 1957, from the Contracting Officer to the contractor. In this letter the Contracting Officer stated that:

"A review of your submittal indicates that the so-called additional classifications you are requesting are either already contained in Department of Labor Decision No. R-13,689, which is a part of your contract, or they can be reclassified conformably to such decision, in accordance with the procedure set forth in paragraph SC-17 of the contract. Since you are, in effect, requesting a reduction in the applicable minimum rates rather than additional classifications, your request is denied."

Since the rates contained in Wage Determination No. R-13,689 are prevailing in Carbon and Luzerne Counties, Pennsylvania, for the type of construction involved, we concur in the views of the Contracting Officer as contained in his letter of May 23, 1957, to the contractor. The Davis-Bacon Act requires the payment of all wages due, unconditionally and not less often than once a week, computed at wage rates not less than those contained in the construction contract. In the event that the contractor continues to pay wage rates less than those contained in the contract, it will be appreciated if you will so inform this Office.

(b) On September 9, 1957, the contracting officer forwarded to plaintiff a copy of the letter from the Solicitor of Labor, with the following directions:

* * * * * * * * *

* * * you are directed to conform with the minimum rates contained in your contract immediately, Restitution is to be made to all laborers and mechanics, employed by you and/or your subcontractors, for all hours worked for which they were paid at a lower rate than that specified.

* * * * * * * * *

(c) On September 10, 1957, plaintiff's attorney wrote to the contracting officer:

* * * * * * * * *

Your letter of September 9, 1957, fails * * * to set forth minimum rates which you are directing that the Contractor and/or its subcontractors shall pay.

The Contractor has never questioned its obligation to pay the minimum rates set forth in the contract which are properly applicable to this project, which under recognized industry practices is a subject properly classified under "Heavy and Highway Construction" rather than "Building Construction" or "Building and Heavy Construction." The contract, however, contains, as the Contractor pointed out in its letter of May 31, 1957, addressed to you, duplicate and inconsistent "minimum rates." Further, the contract contains no rates whatsoever for operators of power equipment under the category of "Heavy and Highway Construction" contained on pages III-14 and III-15 of the contract.

The Contractor contends that the contract properly interpreted requires only that it pay no less than the rates set forth in the contract under "Heavy and Highway Construction" on pages III-14 and III-15 thereof. Inasmuch as the contract does not list rates for certain power equipment operators under "Heavy and Highway Construction," the Contractor, acting pursuant to SC-17(b) of the contract, sought approval of the Contracting Officer of a mutual agreement between the "Contractor and the class of labor involved" establishing rates for the classifications not listed. • • •

• • • • • • • • • •

The directions contained in your letter of September 9, 1957, merely are that the Contractor "conform with the minimum rates contained in [its] contract immediately," without any specificity, and without making any further response to the Contractor's letter of May 31, 1957, which requested that you be specific with respect to this matter.

• • • • • • • • • •

We do not like to extend our already lengthy correspondence on this matter and thus burden your office with unnecessary work. We intend to pay, of course, whatever rates you direct that we pay. We simply request that you make your direction specific so that we can comply therewith.

(d) On September 13, 1957, the contracting officer, responding to the foregoing letter, wrote to plaintiff:

• • • • • • • • • •

Your request for "additional classifications and rates was denied so that the only minimum rates are those contained on pages III-12 through III-15 of the contract. These have been confirmed by the Solicitor of Labor as the prevailing rates for the type of construction involved and are the minimum rates which must be paid.

On the basis of a review of the payrolls submitted by you to date, it appears that you have been complying with the prescribed minimum rates for all classifications with the exception of the power equipment operators. The minimum rates for such employees are set forth on page III-14 of the contract. * * *

* * * * * * * * * *

This letter and the inclosed copy of the Contracting Officer's statement submitted to the Secretary of Labor constitute my decision and findings of fact. Should you disagree with my decision, you may appeal to the Chief of Engineers. * * *

(e) On October 7, 1957, plaintiff appealed the contracting officer's decision of September 13, 1957, to the Chief of Engineers, and consolidated therewith its appeal of June 14, 1957, from the contracting officer's decision of May 23, 1957.

(f) On October 22, 1957, the Government Trial Attorney filed with the Corps of Engineers Claims and Appeals Board a motion to dismiss plaintiff's appeal for lack of jurisdiction, asserting that the disputes clause of the contract "contains an exception to the dispute procedure contained therein where the determination of factual issues is 'otherwise provided (for) in this contract,'" and—

* * * * * * * * * *

3. Disputes over the classification or reclassification of laborers and mechanics is "otherwise provided" for in Paragraph SC-17, Rates of Wages, as follows:

In the event the interested parties cannot agree on the proper classification or reclassification of laborers and mechanics to be used, the question, accom-

panies [sic] by the recommendation of the Contracing Officer, shall be referred to the Secretary of Labor for final determination. [Underscoring supplied.]

4. The dispute has been submitted to the Secretary of Labor and the determination of the Secretary of Labor, adverse to the Appellant's contentions, is contained in his letter dated 26 August 1957.

5. Paragraph 5.6(c) of Regulations, Part 5, Title 29, Subtitle A, Code of Federal Regulations contains the quotation from SC-17, above. Paragraph 5.11 of Regulations states that "All questions arising in any agency relating to the application and interpretation of regulations contained in this part and of the Davis-Bacon Act, as amended, * * * shall be referred to the Secretary of Labor for appropriate ruling or interpretation." [Underscoring supplied.]

(g) By decision dated April 17, 1958, the Corps of Engineers Claims and Appeals Board granted the Government's motion and dismissed plaintiff's appeal.

22. (a) Following are pertinent excerpts from the summary by the Corps of Engineers Claims and Appeals Board preceding its decision:

* * * * * * * * *

The issue involved a determination by the contracting officer that all power equipment operators were to be paid at the rate prescribed for each operator under the classification of "Building and Heavy Construction," while the appellant in essence contends that the revised wage classification schedule did not contain a listing for power operators under the classification of "Heavy and Highway Construction," which it insists is the proper categorization of the work.

* * * * * * * * *

The appellant opposes the Government's motion on the ground that the dispute between it and the contracting officer as to whether the wage determination of the Department of Labor did or did not contain the applicable minimum wage rate to be paid the power opera-

tors is one properly cognizable under the Disputes article of the contract rather than under paragraph SC-17. The appellant points out that SC-17(a) merely provides that the minimum wages to be paid laborers and mechanics shall be set forth in the contract, while SC-17(b) sets up the procedure for the establishment of minimum wages for laborers and mechanics not listed in the contract. * * *

The appellant argues that if the contracting officer is correct in his position that the minimum wages for power equipment operators are set forth in the wage determinations and are therefore included in the contract, it is admitted that the appellant must pay such wages. It is only if the appellant is correct in its view that neither the wage determination nor the contract set forth the minimum wages to be paid the power equipment operators is there any occasion to utilize the procedure of SC-17(b). This type of problem, insists the appellant, is first and primarily a dispute as to whether the applicable wage rates are included in the contract and that it is not the intent of the contract that this type of dispute be referred to the Secretary of Labor for final determination.

(b) Following is the text of the Board's decision:

DECISION

Admittedly, this motion raises problems on which there has been no firm resolution as yet by all of the Governmental agencies concerned. Nonetheless, we are of the opinion that a decision as to whether the power operators are to be paid at rates prescribed for "Building and Heavy Construction" or at rates to be determined as prevailing for "Highway and Heavy Construction" is more properly a decision for the Department of Labor than for this Board. A decision by this Board would obviously have no binding effect on either the Secretary of Labor or on any contractor other than the present appellant on this very appeal. Yet by its very nature a determination of the proper wages to be paid power operators in Carbon and Luzerne Counties, of Pennsylvania, should have a general application to all contractors within an area—in other words, it must

literally be "prevailing"—and the responsibility to fix such a prevailing wage pattern is clearly that of the Secretary of Labor.

Our view is reaffirmed by the fact that the Secretary of Labor, in a letter dated 8 April 1957 to the Secretary of Navy has asserted the position that Regulations, Part 5 (29 CFR, Subtitle A), issued pursuant to Reorganization Plan No. 14, impose a duty on the part of all Government agencies to submit to the Secretary of Labor all questions concerning the application of labor standard laws and provisions for appropriate ruling or interpretation, and has concluded therefrom that the making of final and conclusive determination by the Contract Appeals Board would be inconsistent with the duties required of the Secretary of Labor. Both policy and logic compels a compliance with this view.

Accordingly, for the reasons stated, the Motion to Dismiss is granted and the appeal is dismissed.

RESTITUTION: DAMAGES

23. (a) Plaintiff made full restitution to the employees whose wages had been computed at the lower union contract rates rather than at the minimum rates set forth in Wage Decision No. R-13,689, and thereafter paid its power equipment operators wages computed at the rates set forth in Wage Decision No. R-13,689.

(b) If plaintiff is entitled as a matter of law to recover, the measure of damages should be the difference between the wages actually paid by it to its power equipment operators, computed at the rates in Wage Decision No. R-13,689, and the lower wages it would have paid these employees if it had been permitted to apply the union contract rates.

(c) The parties have agreed that the amount of this difference is $163,384.37.

CONCLUSIONS

24. Plaintiff has exhausted its administrative remedies.

25. The certification by the Corps of Engineers to the Department of Labor, in the request for the second wage determination, that no power equipment operators would be employed on the project in highway-type work, was both inaccurate and misleading. A minor portion of the project work was highway-type work. Under the circumstances existing in Carbon and Luzerne Counties at the time, Highway Construction and Heavy Construction were more nearly synonymous in labor and wage parlance than were Building Construction and Heavy Construction.

26. (a) At the dates of issuance of both Wage Decisions, and at the time plaintiff's bid was submitted, the classification of Heavy and Highway Construction, as a category for the employment of power equipment operators, was well known in Carbon and Luzerne Counties. This classification was better known to more contractors and accounted for the employment of more power equipment operators in that area than was true of the classification known as Building and Heavy Construction.

(b) The power equipment operators required by the project named in plaintiff's contract were available under the classification and at the rates of Heavy and Highway Construction.

(c) Plaintiff's interpretation of the Wage Decisions as reflecting omission of power equipment operators for Heavy and Highway Construction was a reasonable interpretation.

APPENDIX

Exhibit A

Department of Labor Decision No. R-10,416, dated 17 January 1957, contains the following rates of wages applicable to construction of embankment, spillway, tower, etc., at Bear Creek Reservoir, Luzerne and Carbon Counties, Pennsylvania:

Classification of Laborers and Mechanics	*Minimum Rates of Wages Per Hour*
Carpenters (Carbon County)	$2.57
Carpenters, Work over 50 ft. Above Ground (Carbon County)	2.82

APPRENTICE SCHEDULE

		Period and Rate							
	Interval	1st	2nd	3rd	4th	5th	6th	7th	8th
Carpenters (Carbon County)	6 months	60	65	70	75	80	85	90	95

Classification of Laborers and Mechanics	*Minimum Rates of Wages Per Hour*	*Classification of Laborers and Mechanics*	*Minimum Rates of Wages Per Hour*
Asbestos Workers	$3.00	Mason tender	$2.15
Asbestos Workers improvers:		Plasterer tender	2.325
1st year	1.50	Scaffold builders	2.325
2d year	1.80	Laying all clay, terra cotta, ironstone, vitrified concrete or non-metallic pipe and the making of joints for same	2.15
3d year	2.10		
4th year	2.40		
Boilermakers	3.90		
Boilermakers helpers	3.65		
Bricklayers	3.20		
Carpenters (Building)	2.75	Handling and using cutting or burning torches in the wrecking of buildings	2.15
Cement masons	2.95		
Electricians	3.00		
Elevator constructors	3.305		
Elevator constructors helpers	2.31	Blaster	2.325
		Blaster helper	2.15
Glaziers	2.05	Wagon drill operator	2.325
Ironworkers, structural	3.90	Wagon drill helper	2.00
Ironworkers, ornamental	3.90	Men working on asphalt or any tar matter or any hot material	2.15
Ironworkers, reinforcing	3.80		
Laborers: (Building)			
Construction laborer	2.00	Cement mason helper	2.15

Classification of Laborers and Mechanics	Minimum Rates of Wages Per Hour
Laborer assisting plumber and steam fitter	$2.05
Operator of jackhammer, paving breaker and other pneumatic and mechanical tools coming under the jurisdiction of laborers	2.15
Signal men and flagmen	2.00
Carpenter tender	2.00
Pouring of all concrete.	2.00
Mixing of all materials used by masons	2.15
Stripping and dismantling forms	2.00
Loading and unloading, carrying and handling of all rods and materials for use in reinforcing concrete construction	2.00
Excavating for building and all other construction	2.00
Scaffold builder-tender rate	
Cribbing of trenches and shoring underpinning or wrecking and moving of all structures	2.10
Lathers	2.925
Lead burners	3.50
Painters, brush	2.375
Painters, structural steel—open	2.75
Piledrivermen	3.30
Plasterers	3.10
Plumbers	$3.175
Pipe fitters	3.175
Roofers	2.65
Roofers kettlemen	2.275
Roofers helpers	2.15
Sheet metal workers	2.90
Soft floor layers	2.475
Sprinkler fitters	2.79
Stone masons	3.20
Marble setters	3.05
Marble setters helpers	2.125
Carpenters (Heavy and Highway)	2.50
Terazzo workers	3.05
Terazzo workers helpers	2.125
Tile setters	3.05
Tile setters helpers	2.125
Truck drivers: (building)	
Pick-up	1.75
Dump	1.95
Over 2 license	2.00
Truck to and including 12 tons capacity	2.05
Truck to 20 tons capacity (over 12 tons)	2.07
Over 20 tons capacity	2.10
Welders — receive rate prescribed for craft performing operation to which welding is incidental	
Millwrights	3.25
Line construction:	
Linemen	3.43
Cable splicers	3.43
Groundman	2.32

APPRENTICE SCHEDULE

Craft	Interval	Period and Rate* 1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th
Bricklayers	Year	50	60	80	90						
Painters	Year	$1.35	$1.70	$2.00							
Electricians	6 months	33	38	43	48	52	60	62	65		
Carpenters	6 months	60	65	70	75	80	85	90	95		
Sheet metal wkrs	6 months	40	45	50	55	60	65	70	80		
Plumbers	6 months	40	44	48	52	56	60	62	64	66	68
Steamfitters	6 months	40	44	48	52	56	60	62	64	66	68
Sprinkler fitters	6 months	54	58	62	66	70	74	78	82	86	90
Millwrights	6 months	60	65	70	75	80	85	90	95		
Ironworkers	6 months	50	60	66 2/3							
Lead burners	3 months	30	Next 9 mos.		35						
Lead burners	Year	—	40	50	60	75					

* The apprentice rate is by percentage of the journeyman's rate unless otherwise indicated.

Classification of Laborers and Mechanics ***Heavy and Highway Construction***	*Minimum Rates of Wages Per Hour*
Carpenters	$2.50
Laborers:	
Laborers	1.60
Pipe layers	1.75
Wagon drill operators	1.90
Blasters	1.90
Asphalt tampers	1.60
Asphalt rakers	1.60
Form setters (road)	1.90
Caisson men, below 8 ft.—open air	1.90
Cofferdam—below 8 ft.	1.90
Concrete pitmen, puddlers and rubbers	1.60
Landscape, planters, seeders and arborists.	1.60
Magazine tenders	1.60
Railroad track men and signalmen	1.60
Free Air Tunnels and Rock Shafts	
Outside laborers	1.95
Chuck tenders, muckers, nippers, miners and drillers helpers—laborers inside	2.10
Miners, drillers, blasters, pneumatic shield operators, lining spotting and timber work men	2.25

Classification of Laborers and Mechanics ***Free Air Tunnels and Rock Shafts***	*Minimum Rates of Wages Per Hour*
Truck drivers:	
Service truck only ¼ to ½ tons	$1.425
Dump and flat top trucks (straight type):	
U to Z licenses	1.625
Over Z licenses	1.675
Heavy duty hauling equipment:	
Heavy duty trailer	1.775
Winch truck	1.775
Liquid distributor trucks	1.675
Ready mix drivers	1.775
Concrete mix drivers	1.775
Euclid type equipment	1.90
Building and Heavy Construction	
Power equipment operators:	
Steel and stone erection	3.81
Backhoes	3.685
Draglines	3.685
Kenstones	3.685
Shovels	3.685
Trench shovels	3.685
Trench machines	3.685
Cranes, pavers, 21-E and over	3.685
Derricks	3.685
Cableways	3.685
Building hoists (single and double drums)	3.435
Scrapers	3.31

Classification of Laborers and Mechanics Building and Heavy Construction—Con.	*Minimum Rates of Wages Per Hour*
Well drilling rigs	$3.385
Tournapulls	3.31
Bulldozers and tractors	3.06
Tugger machines	3.285
Conveyors	3.285
Concrete breaking machines	3.285
Spreaders	3.285
High or low pressure boilers	3.285
All other equipment on building and construction work not mentioned	3.285
Tunnel mucking machines	3.425
Concrete pumps	3.285
Rollers	3.16
Firemen	2.71
Welding machines	3.235
Well point pumps	3.11
Compressors	3.11
Pumps	3.11
Maintenance engineers	3.11
Oilers and apprentice engineers	2.435
Space heaters	3.06
Hydra hammers	3.285
Fork lifts	3.285
Front end loaders	3.285

Highway Construction

Power equipment operators:	
Backhoes	2.80
Draglines	$2.80
Power shovels	2.80
Cranes	2.80
Keystones	2.80
Pavers, 21-E and over	2.80
Trenching machines	2.80
Cableways	2.80
Carry-alls, scrapers and Tournapull machines	2.40
Bulldozers and tractors	2.40
Motor patrols	2.40
Rollers, high grade finishing	2.40
Concrete breaking machines	2.40
Asphalt spreaders	2.40
Concrete pumps	2.40
Seamen pulverizing mixers	2.30
Rollers, grade fill and stone base	2.30
Farm tractors	2.15
Road finishing machines	2.15
Concrete spreaders	2.15
Form line graders	2.15
Conveyor loaders	2.15
Mechanics and welders	2.35
Compressors	2.20
Pumps	2.20
Firemen	2.00
Apprentice engineers and oilers	1.75

The wage rates contained in this decision are straight hourly wage rates. In some areas management and labor organizations in the construction industry have collectively bargained for health and welfare fund contributions. Such contributions are not included in wage rates determined by the Secretary of Labor for construction projects.

Exhibit B

Department of Labor Decision No. R-13,689, dated 11 March 1957, contains the following rates of wages applicable to construction of embankment, spillway, tower, etc., at Bear Creek Reservoir, Luzerne and Carbon Counties, Pennsylvania:

Classification of Laborers & Mechanics	*Minimum Rates of Wages Per Hour*
Carbon County:	
Bricklayers	$3.25
Carpenters	2.57
Cement masons	2.64
Ironworkers, structural	3.75
Ironworkers, reinforcing	3.60
Laborers: (Building construction)	
Laborers	2.15
Air tool op. (jackhammer, vibrator)	2.40
Mason tenders	2.45
Mortar mixers	2.45
Painters, brush	2.475
Painters, structural steel	3.05
Plumbers	3.35
Sheet metal workers	2.90
Truck drivers: (building construction)	
General	2.05
Dumps	2.20
Concrete mixer	1.75

Luzerne County

APPRENTICE SCHEDULE

		Period and Rate*									
Craft	Interval	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th
Bricklayers	Year	50	60	80	90						
Painters	Year	$1.35	$1.70	$2.00							
Electricians	6 months	33	38	43	48	52	60	62	65		
Carpenters	6 months	60	65	70	75	80	85	90	95		
Sheet metal wkrs	6 months	40	45	50	55	60	65	70	80		
Plumbers	6 months	40	44	48	52	56	60	62	64	66	68
Steamfitters	6 months	40	44	48	52	56	60	62	64	66	68
Sprinkler fitters	6 months	54	58	62	66	70	74	78	82	86	90
Millwrights	6 months	60	65	70	75	80	85	90	95		
Ironworkers	6 months	50	60	66 2/3							
Lead burners	3 months	30	Next 9 mos.		35						
Lead burners	Year	—	40	50	60	75					

* The apprentice rate is by percentage of the journeyman's rate unless otherwise indicated.

Luzerne County	*Per Hour*
Asbestos workers	$3.00
Asbestos workers improvers:	
1st year	1.50
2nd year	1.80
3rd year	2.10
4th year	2.40
Boilermakers	3.90
Boilermakers helpers	3.65
Bricklayers	3.20
Carpenters (building)	2.75
Cement masons	2.95
Electricians	3.00
Elevator constructors	3.305
Elevator constructors helpers	2.31
Glaziers	2.05
Ironworkers, structural	3.90
Ironworkers, ornamental	3.90
Ironworkers, reinforcing	3.80
Cement mason helper	2.15
Laborers: (Building)	
Construction laborer	2.00
Mason tender	2.15
Plasterer tender	2.325
Scaffold builders	2.325
Laying all clay, terra cotta, ironstone, vitrified concrete or non-metallic pipe and the making of joints for same	2.15
Handling and using cutcutting or burning torches in the wrecking of buildings	2.15
Blaster	2.325
Blaster helper	2.15
Wagon drill operator	2.325
Wagon drill helper	2.00
Men working on asphalt or any tar matter or any hot material	2.15
Laborer assisting plumber and steam fitter	2.05

Luzerne County—Con.	*Per Hour*
Operator of jackhammer, paving breaker and other pneumatic and mechanical tools coming under the jurisdiction of laborers.	$2.15
Signalmen and flagmen	2.00
Carpenter tender	2.00
Pouring of all concrete	2.00
Mixing of all materials used by masons	2.15
Stripping and dismantling forms	2.00
Lead burners	3.50
Loading and unloading, carrying and handling of all rods and materials for use in reinforcing concrete construction	2.00
Excavating for building and all other construction	2.00
Scaffold builder-tender rate	
Cribbing of trenches and shoring underpinning or wrecking and moving of all structures	2.10
Lathers	2.925
Painters, brush	2.375
Painters, structural steel—open	2.75
Piledrivermen	3.30
Plasterers	3.10
Plumbers	3.175
Pipe fitters	3.175
Roofers	2.65
Roofers kettlemen	2.275
Roofers helpers	2.15
Sheet metal workers	2.90
Soft floor layers	2.475
Sprinkler fitters	2.79

Luzerne County—Con.	*Per Hour*
Stone masons	$3.20
Marble setters	3.05
Marble setters helpers	2.125
Carpenters (Heavy and Highway)	2.50
Terazzo workers	3.05
Terazzo workers helpers	2.125
Tile setters	3.05
Tile setters helpers	2.125
Truck drivers: (building)	
Pick-up	1.75
Dump	1.95
Over Z license	2.00
Truck to and including 12 tons capacity	2.05
Truck to 20 tons capacity (over 12 tons)	2.07
(over 20 tons capacity)	2.10
Welders—receive rate prescribed for craft performing operation to which welding is incidental	
Millwrights	3.25
Line construction:	
Linemen	3.43
Cable splicers	3.43
Groundman	2.32
Building and Heavy Construction	
Power equipment operators:	
Steel and stone erection	3.81
Backhoes	3.685
Draglines	3.685
Keystones	3.685

Building and Heavy Construction—Con.	*Per Hour*
Shovels	$3.685
Trench shovels	3.685
Trench machines	3.685
Cranes, pavers, 21-E and over	3.685
Derricks	3.685
Cableways	3.685
Building hoists (single and double drums)	3.435
Scrapers	3.31
Well drilling rigs	3.385
Tournapulls	3.31
Bulldozers and tractors	3.06
Tugger machines	3.285
Conveyors	3.285
Concrete breaking machines	3.285
Spreaders	3.285
High or low pressure boilers	3.285
All other equipment on building and construction work not mentioned	3.285
Tunnel mucking machines	3.425
Concrete pumps	3.285
Rollers	3.16
Firemen	2.71
Welding machines	3.235
Well point pumps	3.11
Compressors	3.11
Pumps	3.11
Maintenance engineers	3.11
Oilers and apprentice engineers	2.435
Space heaters	3.06
Hydra hammers	3.285
Fork lifts	3.285
Front end loaders	3.285

Heavy and Highway Construction	*Per Hour*
Carpenters	$2.50
Laborers:	
Laborers	1.60
Pipe layers	1.75
Wagon drill operators	1.90
Blasters	1.90
Asphalt tampers	1.60
Asphalt rakers	1.60
Form setters (road)	1.90
Caisson men, below 8 ft.—open air	1.90
Cofferdam—below 8 ft.	1.90
Concrete pitmen, puddlers and rubbers..	1.60
Landscape, planters, seeders and arborists	1.60
Magazine tenders ...	1.60
Railroad trackmen and signalmen	1.60

Free Air Tunnels and Rock Shafts	
Outside laborers	1.95
Chuck tenders, muckers, nippers, miners and drillers helpers—laborers inside	2.10
Miners, drillers, blasters, pneumatic shield operators, lining spotting and timber workmen	$2.25
Truck drivers:	
Service truck only ¼ to ½ tons	1.425
Dump and flat top trucks (straight type):	
U to Z licenses	1.625
Over Z licenses ...	1.675
Heavy duty hauling equipment:	
Heavy duty trailer	1.775
Winch truck	1.775
Liquid distributor trucks	1.675
Ready mix drivers ..	1.775
Concrete mix drivers	1.775
Euclid type equipment	1.90

The wage rates contained in this decision are straight hourly wage rates. In some areas management and labor organizations in the construction industry have collectively bargained for health and welfare fund contributions. Such contributions are not included in wage rates determined by the Secretary of Labor for construction projects.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and its petition is therefore dismissed.

STATUTES

Davis-Bacon Act, 40 U.S.C. § 276a

Rate of wages for laborers and mechanics

The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public building or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the State, or the Territory of Alaska, or the Territory of Hawaii in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued pay-

ments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

Wunderlich Act, 41 U.S.C. § 321, § 322

Sec. 321. No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Sec. 322. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Regulations Issued by the Secretary of Labor

Sec. 5.6 (16 Fed. Reg. 4431-4432; 29 CFR § 5.6)

(c) Under the Davis-Bacon Act the contracting officer shall require that any class of laborers and mechanics not listed in the Secretary's decision, which will be employed on the contract, shall be classified or reclassified by the contractor or subcontractor conformably to the Secretary's decision and a report of the administrative action taken in such cases shall be transmitted by the agency to the Secretary of Labor. In the event the interested parties cannot

agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for final determination. Where classifications of laborers and mechanics are desired under any of the other statutes listed in § 5.1 which were not included in the original decision, a supplementary wage determination shall be requested by the Agency Head.

Sec. 5.11 (16 Fed. Reg. 4432; 29 CFR § 5.11)

§ 5.11 *Rulings and interpretations.* All questions arising in any agency relating to the application and interpretation of the regulations contained in this part and of the Davis-Bacon Act, the Anti-Kickback Act, the Eight Hour Laws, and the labor standards provisions of the following acts, the National Housing Act, the Housing Act of 1949, the Hospital Survey and Construction Act, the Federal Airport Act and the School Survey and Construction Act of 1950, shall be referred to the Secretary of Labor for appropriate ruling or interpretation. The rulings and interpretations of the Secretary shall be authoritative and may be relied upon as provided for in section 10 of the Portal to Portal Act of 1947. Requests for such rulings and interpretations should be addressed to the Secretary of Labor, United States Department of Labor, Washington 25, D. C.

Invitation for Bids

(No. CIVENG 38-109-57-92)

Instructions to Bidders (Standard Form 22)

* * *

2. *Conditions at Site of Work.* Bidders should visit the site to ascertain pertinent local conditions readily determined by inspection and inquiry, such as the location, accessibility and general character of the site, labor conditions, the character and extent of existing work within or

adjacent thereto, and any other work being performed thereon.

Contract Between Nello L. Teer Company and the United States

(No. DA-36-109-CIVENG-57-205)

1. DEFINITIONS.—(a) The term "Secretary" means the Secretary of the Army; the terms "Secretary of the Army" or "Head of the Department" as used herein shall have one and the same meaning; and the term "his duly authorized representative" means the Chief of Engineers, Department of the Army, or an individual or board designated by him.

(b) The term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

• • • • • •

6. DISPUTES.—Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in

support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

* * * * *

GC-3. SITE INVESTIGATION: The Contractor acknowledges that he has satisfied himself as to the nature and location of the work, the general and local conditions, including but not restricted to those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during the prosecution of the work. The Contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and subsurface material or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government as well as from information presented by the drawings and specifications made a part of this contract. Any failure by the Contractor to acquaint himself with the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government assumes no responsibility for any conclusions or interpretations made by the Contractor on the basis of the information made available by the Government. The Government also assumes no responsibility for any understanding or representations made by its officers or agents during or prior to the execution of this contract, unless (1) such understanding or representations are expressly stated in the contract and (2) the contract expressly provides that the responsibility therefor is assumed by the Government. Representations which are not expressly stated in the contract and for which liability is not expressly assumed by the Government

in the contract shall be deemed only for the information of the Contractor.

* * * * *

SC-17 RATES OF WAGES:

(a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as set forth below.

(b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanies (sic) by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

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207–534—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 900

NELLO L. TEER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 57a–111a),[1] is reported at 348 F. 2d 533.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1965. A timely motion for reconsideration was denied on October 15, 1965. The petition for a writ of certiorari was filed on January 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] "Pet. App." references herein refer to the Appendix to the Petition for Certiorari.

QUESTION PRESENTED

Whether the Court of Claims erred in holding that the Secretary of Labor had made a determination of the minimum wage rates to be paid power equipment operators working on a government construction contract and that the correctness of the Secretary's determination is not subject to judicial review.

STATUTES, REGULATIONS AND CONTRACTUAL PROVISIONS INVOLVED

The statutes, regulations and contractual provisions involved are set forth in the Appendix to the Petition at pp. 112a–117a. In addition, the following Regulations of the Department of Labor and the Department of Defense are pertinent to a resolution of the question here involved.

29 C.F.R. Part 7—PRACTICE BEFORE WAGE APPEALS BOARD provides in pertinent part:

> § 7.10 Review of decisions of the Solicitor other that those in wage determination, debarment, or liquidated damages proceedings.
>
> (a) The Wage Appeals Board may review in its discretion, decisions of the Solicitor relating to controversies concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations which arise under the Davis-Bacon Act and its related acts and the rules published in Parts 1, 3, and 5 of this subtitle, but which do

not arise in proceedings reviewable under §§ 7.8 and 7.9 of this part. The procedures for such review shall be those specified in the remaining paragraphs of this section or any other appropriate procedure upon adequate notice to the interested persons or parties.

(b) Decisions of the Solicitor rendered under § 5.11(b) of this subtitle shall be reviewable in the manner prescribed in § 7.9 of this part.

(c) Interested persons or parties may request review by the Board of any decision of the Solicitor rendered under § 5.5(a)(1)(ii) or § 5.12 of this subtitle which meets the standards prescribed in paragraph (a) of this section. The decisions of the Solicitor shall be reviewable in the manner prescribed in § 7.9 of this part, except that, in addition to the requirements therein stated, the petition for review shall set forth facts showing that the question or questions presented concern the payment of prevailing wage rates or proper classification which involve significant sums of money, large groups of employees, or novel or unusual situations.

The Armed Services Procurement Regulations have been amended as of April 29, 1965, 30 Fed. Reg. 5992, to read as follows:

§ 7.603–26 Disputes concerning labor standards.

Insert the following clause in all contracts subject to the Davis-Bacon Act.

Disputes Concerning Labor Standards

(January 1965)

Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decision of the Secretary of Labor or the applicability of the labor provisions of the contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor.

STATEMENT

This case arose out of a contract between the United States, acting through the United States Army Corps of Engineers, and petitioner for the construction of the Bear Creek Reservoir on the Lehigh River in Carbon and Luzerne Counties, Pennsylvania. Pursuant to the Davis-Bacon Act, the contract, which was awarded to petitioner on April 26, 1957, required the petitioner to pay its employees at rates not less than those determined by the Secretary of Labor to be prevailing for corresponding classes of laborers in the pertinent locality (Pet. App. 75a, 76a). Petitioner was required to, and did, pay its power equipment operators the wages established by the Secretary of Labor's Wage Decision No. R–13,689 (which was attached to the invitation to bid and a part of the con-

tract) for power equipment operators in "Building and Heavy Construction." Petitioner seeks $163,384.37 in damages for the difference between those wages and the lower wages it would have paid its power equipment operators under a different method of classifying the work they performed.

1. *The facts.* The underlying facts were found by the Court of Claims, and are not directly challenged by the petitioner.[2]

At the time the contract in suit was awarded, two different wage scales were paid power equipment operators in the area in which the contractual work was to be performed. The different wage scales resulted from the different collective bargaining approach of the two unions active in the representation of power equipment operators in that area. Local 542 of the International Operating Engineers, a craft union representing power equipment operators and affiliated with the American Federation of Labor, negotiated a "Building and Heavy Construction" rate and a lower rate for highway construction (Pet. App. 81a, 83a). On the other hand, United Construction Workers, Division of District 50, an affiliate of the United Mine Workers, was an industrial union whose membership included a variety of types of workers in addition to power equipment operators. District 50 did not engage in "Building Construc-

[2] We note, however, that petitioner has relied upon several findings made by a Commissioner of the Court of Claims, which were later rejected by the Court itself. See Pet. 9–10. Compare, Commissioner's Finding 24 (Pet. App. 54a) with the Court's Finding 24 (Pet. App. 103a).

tion", but confined itself to "Heavy Construction and Highway Construction" for which it negotiated rates of pay comparable to the AFL Operating Engineers' lower rates for highway construction (Pet. App. 58a–59a, 81a, 83).

The Davis-Bacon Act, 40 U.S.C. 276a(a) requires government contractors to pay mechanics and laborers wages "computed at * * * rates not less than those stated in the advertised specifications * * *" as having been "determined by the Secretary of Labor to be prevailing * * * on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State * * *."

Prior to issuance of the invitation to bid on the Bear Creek Reservoir project, the Corps of Engineers, in accordance with the Davis-Bacon Act, requested the Department of Labor to make a "determination of the wage rates to be paid laborers and mechanics" on the construction project for the "entire schedule of crafts" (Pet. App. 59a). In response, the Department of Labor issued Wage Decision No. R–10,416 (Pet. App. 104a–107a) which included a specification of wage rates for power equipment operators under each of two classifications: (1) "Building and Heavy Construction" (from approximately $3.06 to $3.81 per hour) and (2) "Highway Construction" (from $2.00 to $2.80 per hour) (Pet. App. 59a, 106a–107a). It did not include rates for power equipment operators under the classification "Heavy and Highway Construction." Wage Decision No. R–10,416, was incorpo-

rated as part of paragraph SC–17 of the Special Conditions of the contract, and attached to the invitation for bids on the contract (Pet. App. 59a, 77a).

On March 6, 1957, the Corps of Engineers requested the Department of Labor to make another wage determination for the project.* The Department of Labor accordingly issued a new wage decision, No. R–13,689 (Pet. App. 108a–111a), which the Corps of Engineers sent to all prospective bidders, including petitioner, as an addendum to the invitation to bid to be substituted for the original determination (Pet. App. 60a, 87a, 108a–111a). The new wage decision listed wage rates for power equipment operators in accordance with the higher scale paid those in "Building and Heavy Construction," and did not include a rate for the power equipment operators engaged in "Highway Construction" or "Heavy and Highway Construction" (*ibid*).

Prior to submitting its bid for the project, petitioner's president and members of its engineering estimating staff made an inspection of the job sites and local conditions including prevailing wages (Pet. App. 61a, 86a). At that time, two dam projects were under

*In the request, the Corps of Engineers erroneously certified to the Department of Labor that no highway work requiring the use of power equipment would be involved; in actuality, 4 per cent of the project was highway-type construction (Pet. App. 60a, 87a). The government has never seriously contested that an error was made in this respect and that the lower rate for highway construction was applicable to some 4 per cent of the work under the contract. Petitioner's claim, however, is not limited to the discrepancy in that 4 percent which, had it been timely presented, could in all likelihood have been settled administratively.

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way in the area. On the Forest Dam and Reservoir project of the City of Bethlehem Water Authority the power equipment operators were being paid the District 50 rates for "Heavy and Highway Construction." On the other hand, at the Corps of Engineers' Bear Creek project where construction was proceeding on outlet works under a contract awarded in 1956, the power equipment operators were being paid the higher AFL Operating Engineers' rates for "Building and Heavy Construction" (Pet. App. 85a).

Notwithstanding these facts, petitioner decided to proceed upon the assumption that the omission from the addendum to the invitation to bid of a lower wage rate for power equipment operators engaged in heavy or heavy and highway construction was the result of inadvertence rather than a reflection of the AFL Operating Engineer's higher wage rate for both building and heavy construction (Pet. 7). Petitioner prepared and submitted its bid for the contract on the gamble that its assumption was correct; it subsequently appeared that the assumption was not correct and that there had been no omission from the wage decision incorporated in the addendum[4] (Pet. App. 96a–97a). This action is an attempt to recoup the loss of that gamble.

Petitioner's bid was accepted on April 26, 1957. Under the terms of the contract for which the petitioner was the successful bidder, the petitioner agreed

[4] Other than the omission referred to at p. 7, fn. 3, *supra*, affecting only 4 per cent of the work.

to pay its employees rates not less than those set by the Secretary of Labor in the wage determination attached to the invitation to bid (Pet. App. 76a–77a). Petitioner, nevertheless, contracted with District 50 to pay power equipment operators at rates lower than those specified for such workers in the addendum and comparable to those which had been included in the Department of Labor's first wage decision under "Highway Construction" (Pet. App. 61a, 87a).

2. *Administrative Proceedings.* On May 14, 1957, petitioner's representative informed the government's area engineer that petitioner intended to utilize rates and classifications of labor which were not included in the contract. Accordingly, petitioner submitted to the contracting officer a formal request for additional classification and rates under Paragraph SC–17 of the Special Conditions of the contract (Pet. App. 62a, 88a). Paragraph SC–17 provides that any class of workers not covered by the categories of the wage decision shall be classified or reclassified by agreement between the contractor and the class of workers involved with the consent of the contracting officer and that if the interested parties cannot agree the question "shall be referred to the Secretary of Labor for final determination". The contracting officer denied the request by letter dated May 23, 1957, stating that petitioner was, in effect, requesting a reduction in the applicable minimum rates rather than additional classfications. He added that if petitioner believed that the Secretary's determination of

prevailing wage rates was "not in accord with the prevailing area practice, it is suggested that you present the matter to the Secretary of Labor for his decision" (Pet. App. 62a, 88a, 89a).

On May 31, 1957, petitioner replied that its request for a new classification was based on "what we believe was an obvious omission" in the wage decision "which is a part of our contract" (Pet. App. 62a, 89a). The contracting officer rejected this argument, directed petitioner to pay the power equipment operators at the rates listed in the Secretary of Labor's wage decision (Pet. App. 62a, 90a), and invited referral to the Secretary of Labor (Pet. App. 91a).

Contending that this dispute was subject to the general disputes provision of the contract (Pet. App. 115a–116a), and therefore appealable to the Corps of Engineers rather than to the Secretary of Labor, petitioner appealed the decision of the contracting officer to the Chief of Engineers on June 14, 1957 (Pet. App. 63a, 91a–93a). On June 24, 1957, the contracting officer recommended to the Chief of Engineers that "the dispute be processed under the provisions of paragraph SC–17(b) of the contract and paragraph 5.6(c) of [the] Regulations [of the Department of Labor] and final determination as to proper classification and rate be made by the Secretary of Labor rather than the Chief of Engineers" (Pet. App. 93a, 63a). Over petitioner's objection to this recommendation (Pet. App. 63a, 94a–96a), the Office of the Chief of Engineers forwarded the ques-

tion to the Solicitor of Labor (Pet. App. 63a, 96a).[5]

By letter dated August 26, 1957, the Solicitor of Labor concurred in the contracting officer's decision and stated (Pet. App. 96a):

> Wage Determination No. R-13,689 dated March 11, 1957 is the applicable determination for the project and was made a part of the contract between the contractor and the Corps of Engineers for the construction of the project. The rates therein are prevailing in Carbon and Luzerne Counties, Pennsylvania, for the type of construction involved and are currently being paid for work at the same location being performed by another contractor.

Thereafter, petitioner was again directed by the contracting officer to comply with the minimum wage rates contained in the contract and again appealed to the Chief of Engineers (Pet. App. 63a, 97a–99a). On April 17, 1958, the Corps of Engineers Claims and Appeals Board dismissed the appeal on the ground that the Secretary of Labor had sole authority to determine the prevailing wage pattern (Pet. App. 63a, 100a–102a).

3. *Judicial Proceedings.* Petitioner then paid its power equipment operators the wage rates specified in the contract and brought this suit to recover the difference between the contractual minimum and the lower rate it had previously been paying (Pet. App. 64a, 102a).

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[5] By Secretary of Labor's General Order 41, dated October 9, 1953, the Secretary of Labor delegated his duties under the Davis-Bacon Act to the Solicitor of Labor.

The Court of Claims found, with one judge dissenting, that the Secretary of Labor had made a determination of the rates to be paid to the power equipment operators which was incorporated in the contract and obligatory on petitioner, and that under this Court's decision in *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, the correctness of the Secretary's wage determination was not subject to judicial review.

ARGUMENT

The decision of the Court of Claims is merely an application of this Court's ruling in *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171. The decision is correct, and there is no conflict of decisions and no occasion for further review by this Court.

1. In *United States* v. *Binghamton Construction Co., Inc., supra,* a contractor brought suit in the Court of Claims against the United States to recover the difference between the wage rate as determined by the Secretary of Labor under the Davis-Bacon Act, and the higher wages actually paid as a result of a higher rate established for another government project, which the contractor had to meet in order to obtain the necessary labor. As in the instant case, prior to the institution of the action, the contracting officer and the Chief of Engineers denied the contractor's claim because "[t]here is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions" of the Davis-Bacon Act (347 U.S. at 175 fn. 7). This

Court, in reversing a judgment for the contractor in the Court of Claims, held that the contractor could not recover from the government because the rates included in the contract did not constitute a representation or warranty as to the prevailing rates in the locality. "On its face," the Court said, "the Act is a minimum wage law designed for the benefit of construction workers * * *" (347 U.S. at 178).

> The language of the Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects. Congress sought to accomplish this result by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. The correctness of the Secretary's determination is not open to attack on judicial review [347 U.S. at 176–177].

Petitioner argues that, even if, under *Binghamton*, the Secretary's determination of wage rates is not subject to judicial review, a different issue is presented where, after the contract has been awarded, it becomes necessary to classify a category of worker omitted from the Secretary's wage decision. But this contention fails to come to grips with the fact that the contracting officer, the Department of Labor and the Court of Claims all found that there had been no omission and that the rates for power equipment operators were prescribed by the wage decision incorporated in the contract (Pet. App. 61a, 88a). Further-

more, Paragraph SC–17(b) of the contract, which petitioner invoked in seeking a classification of the power equipment operators, expressly provides that disagreements with respect to classification shall be referred to the Secretary of Labor.* Under such circumstances, petitioner can hardly object to the referral of the dispute to the Secretary.

Petitioner's attempt to distinguish between the concededly unreviewable wage determination (Pet. 15–16) and the classification of classes of workers is without support in precedent or reason. The Secretary's wage decision inherently requires him to determine the categories of workers to which various rates pertain as well as the rates themselves. Obviously if bricklayers ($3.25 per hour) could be relabeled carpenters ($2.57 per hour), the whole purpose of a determination by the Secretary of Labor under the Davis-Bacon Act would be defeated. The Court of Claims was clearly correct in recognizing that a classification of workers' skills is merely a part of a wage determination and that a wage determination is more than a list of wage rates. As the Comptroller General has noted, in preparing

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*It is clearly irrelevant that petitioner reached an agreement on the wages for power equipment operators with District 50. The contracting officer withheld his approval of that agreement because it involved the payment of wages lower than those specified in the contract. The Davis-Bacon Act expressly provides that mechanics and laborers shall be paid

> * * * wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics * * *. [40 U.S.C. § 276a(a).]

the determination of the prevailing minimum wages which the Davis-Bacon Act requires the contractor to pay, the Secretary of Labor must specify "the classification of work for which each wage rate is determined to prevail on such projects in the locality, as well as the wage rate itself * * *." 36 Comp. Gen. 806, 807.

2. Petitioner's insistence that it was entitled to review under the disputes clause (Pet. App. 115a–116a) rather than under Paragraph SC–17(b) is clearly without merit. The disputes clause by its terms is applicable "except as otherwise provided in this contract * * *"; Paragraph SC–17(b) unmistakably provides otherwise. Nor would review under the disputes clause by the Corps of Engineers Claims and Appeals Board of the Secretary of Labor's determination make practical sense in the context of the Davis-Bacon Act. As the Board observed in its decision (Pet. App. 101a–102a):

> A decision by this Board would obviously have no binding effect on either the Secretary of Labor or on any contractor other than the present appellant on this very appeal. Yet by its very nature a determination of the proper wages to be paid power operators in Carbon and Luzerne Counties of Pennsylvania, should have a general application to all contractors within an area—in other words, it must literally be "prevailing"—and the responsibility to fix such a prevailing wage pattern is clearly that of the Secretary of Labor.

Similarly, petitioner's invocation of the Wunderlich Act, 41 U.S.C. 321–322, is unwarranted. The Wunderlich Act limits the effect of contractual provision for the finality of the decision of the con-

tracting or other officer. But the finality accorded the Secretary of Labor's wage determinations has its source in the statutory scheme of the Davis-Bacon Act, including its requirement of the incorporation of such determinations in government contracts, rather than in any contractual provision. See *United States* v. *Binghamton Construction Co.*, 347 U.S. 171. Any other reading would undermine the act's function as "a minimum wage law" (*id.* at 178). The legislative history of the act contains no suggestion that Congress intended to authorize or require judicial review of wage determinations made pursuant to the Davis-Bacon Act.[1]

3. Finally, whatever merit there may have been in petitioner's foreboding of widespread administrative abuse under the Davis-Bacon Act (Pet. 17–19) has been largely rendered moot since the Secretary of Labor has, subsequent to the administrative proceedings in this case, created a Wage Appeals Board to review "decisions of the Solicitor relating to controversies concerning the payment of prevailing wage rates or proper classifications which involve significant sums of money, large groups of employees, or novel or unusual situations which arise under the Davis-Bacon Act." 29 C.F.R. § 7.10 (1965 Rev.). Thus, the administrative procedures on which petitioner seeks re-

[1] Recently, the minority members of the House Committee on Education and Labor proposed the enactment of a provision authorizing judicial review of the Secretary's findings in Davis-Bacon proceedings, H. Rep. No. 308, "Amendments to the Davis-Bacon Act," 88th Cong., 1st Sess., at 29 (1963). The majority made no such recommendation (*ibid.*) and no such legislation was passed.

view have been changed, and the petition presents no question of prospective importance.[8]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1966.

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[8] Petitioner also relies on an alleged conflict between the Secretary of Labor and the Comptroller General and other contracting agencies of the government. The Attorney General in a letter dated September 24, 1965, to the Secretary of Commerce recognized that by Reorganization Plan No. 14 of 1950, 15 F.R. 3176, the Department of Labor was intended to be "the central agency of the Government for dealing with labor problems" and that the plan "authorized the Secretary of Labor 'to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects.'" 41 Op. A.G. 488, 491. Moreover, the Armed Service Procurement Regulations were recently amended to prevent future recurrences of the anomalous situation whereby three Armed Service Review Boards permitted review of the Davis-Bacon determination, cited in the Petition at pp. 24–27. The present rules specify that disputes concerning Labor standards with respect to "classifications or wage rates contained in the wage determination decision of the Secretary of Labor" shall be referred to the Secretary of Labor for resolution. 30 Fed. Reg. at 5992 (April 29, 1965).

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v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS AMICUS CURIAE

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BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS AMICUS CURIAE

INTRODUCTION

The Associated General Contractors of America submits this brief as *amicus curiae* in support of the granting of the petition because of the concern of its membership in this matter. Permission to file a brief was granted pursuant to consent of the parties under Rule 42(1).

The Associated General Contractors of America (herein referred to as the AGC) is a national association of general construction contractors with approximately 7,950 members in the United States. The general construction industry as a whole employs approximately 3,500,000 workers and annually performs contracts in the amount of $96,000,000,000. Members of the AGC annually perform contracts in the amount of $75,000,000,000, or approximately 80 per cent of the construction in the industry.[1] AGC members directly employ on their own payrolls approximately 1,000,000 workers.

Almost all of the contractors which are members of the AGC are affiliated with local chapters of the AGC. There are 130 such chapters, statewide or metropolitan in their jurisdiction. At least one such chapter exists in each of the 50 states. In addition to the approximately 7,950 general contractors which are members of the AGC and its local chapters, there are numerous nongeneral contractors—contractors in the mechanical, electrical or other specialized fields—which hold associate membership in the local chapters of the AGC but are not members of the national AGC.

STATEMENT OF POSITION

The petition of Nello L. Teer Company, a member of the AGC, raises an issue of concern to the AGC and of substantial importance to government contractors in general, for as a result of the decision of the Court of Claims in the case at bar the contractual safeguards which heretofore have enabled the govern-

[1] In 1965, AGC members performed government contracts in the amount of approximately $20,000,000,000.

ment contractor to support the estimates of labor costs upon which his bid was predicated have been destroyed. The Court of Claims held that the appropriate classification of workers employed on the project was not an issue cognizable under the standard Disputes clause of the contractor's contract with the United States, but instead was a matter properly referrable to the Solicitor of Labor for decision. Under the standard Disputes clause, an aggrieved contractor has the right to be heard by and the opportunity to present evidence on his behalf to a contract appeals board. Under the arrangement sanctioned in this case by the Court of Claims, the contractor has no contractual or statutory right whatsoever to present evidence or to be heard. No matter how arbitrary the classification of workers imposed by the Department of Labor may be—and in the instant case the classification which the contractor was forced to accept was plainly at variance with prevailing practice in the locality—the Court of Claims seems to have choked off any hope of judicial redress.

The procedure surrounding classification questions would be important if for no other reason than the frequency with which such questions arise. Indeed, on virtually all large construction projects, there are instances of either classifications omitted from the wage determination or questions as to which of two listed classifications embraces the workers in issue. In fact, there is a standard form "Request for Authorization of Additional Classifications" generally available for contractors to submit to the contracting officer after the performance of the contract has begun (see Pet. 10a).

By its removal of channels of appeal from the contractor, the Court of Claims—apart from negating

what heretofore had been regarded as a contractual right—has injected a chaotic element into the bidding, to the detriment of the contractor and the public. The rationale for competitive bidding in government contracts is that the government, and thus the public, benefits by securing the lowest price for required construction consistent with sound performance and, with respect to the labor provisions of the contract, consistent with prevailing wage practices. If, however, the contractor is to be exposed to additional risks through an inability to challenge classifications imposed by administrative fiat, he must take this into account as a contingency for bidding purposes—and accordingly include a reserve for such a contingency in his bid. The inflationary tendencies of such an approach are obvious, and particularly unfortunate in that the terms of the usual construction contract—until the Court's decision—had seemed to obviate the necessity for any such apprehension on the part of the contractor.

REASONS FOR GRANTING THE WRIT

1. As the number and dollar volume of federal or federally assisted construction contracts spiral to truly staggering proportions—and the likelihood of administrative error by the overworked and undermanned staff of the Solicitor of Labor becomes commensurately greater—the need to safeguard contractors against administrative excesses would appear to be more important than ever. In 1965, contracts containing prevailing wage determinations by the Secretary of Labor amounted to approximately $20,000,000,000. As recently as 1961 the burden of turning out the vast number of wage determinations for incorporation in government contracts rested on a staff of only 19 pro-

fessional employees in the Department of Labor (see Pet. 18).

The task of correctly classifying employees at work on projects is wholly different, and often far more elusive, than the determination of a prevailing minimum wage for established classifications. The ascertainment of a prevailing minimum, viz., the determination that the going rate for plumbers is $4.50 rather than $4.25, is, or should be, a statistical process initiated by a tally of wage rates for persons performing work of the type in issue within the appropriate geographic boundaries. This has historically been the province of the Secretary of Labor, since the inception of the Davis-Bacon Act.

Questions of classification present quite different considerations, for a summing up of all wage rates paid plumbers sheds no light on whether the employees at work on the project are performing the tasks of plumbers or pipelayers. Indeed, only by an on-site examination and analysis of the work which they are in fact performing, and the nature of the particular construction in which they are engaged, can any meaningful classification decision be made. Hence for a number of years it was believed that the determination of the proper classification of employees was not a matter for the Department of Labor at all, but rather one for the official on the construction site—the contracting officer, whose function it is to oversee the performance of the contract and to deal with disputed questions of fact that arise during the course of the work.

In recent years the Secretary of Labor has claimed the authority to make determinations of classification—

although such authority is nowhere set forth in the Davis-Bacon Act or other statute—and had met with some, but spotty success, in persuading the contracting agencies to refer such questions to him or to defer to his rulings (see cases at Pet. 24-27). Not until the case at bar was such authority recognized by a federal court, which it may be noted, not only recognized such authority in the Secretary of Labor, but found that decisions made thereunder were final and immune from judicial review. That the decision of the Court of Claims is acknowledged to be the definitive word on the subject is manifested by the acquiescence of the Comptroller General—long an opponent of the Secretary's seizure of authority in this area—in the Court's decision that the Secretary's disposition of classification questions is not reviewable. See Decision B-154253 of Comptroller General (Dec. 1965).

2. Wholly apart from the recognition of the Secretary's authority to classify employees, the placing of *final* authority in the Secretary deprives the contractor of contractual safeguards heretofore thought to protect him against administrative abuses. The contractor heretofore had a right to be heard with regard to *any* disputed questions of fact arising out of the contract. The invitation for bids contains standard advice to the contractor that he should make an on-site inspection "to ascertain pertinent local conditions readily determined by inspection and inquiry, such as . . . labor conditions" (Pet. 114a). The contractor is thus put on notice that he cannot disregard with impunity the actual conditions existing at the site, and in calculating the costs of performing the work bears responsibility for any judgments—or misjudgments—that he might make. His protection, however, lies in

his access to procedures under the standard Disputes clause of the contract and the rights accorded therein to present evidence in his behalf.

Such protection—the right to be heard—is essential in cases where the appropriate job classification is in issue, for the classification of employees is not self-evident from a reading of the terms of the contract. Unlike the wage rate applicable to a particular classification, where the rate appears clearly and unambiguously on the face of the contract, the proper classification must be selected by the contractor from a listing of a number of classifications, or it may not be listed at all because of error or oversight, and need to be added once the work is under way. Frequently, as in the first wage determination in the case at bar, rates for the entire schedule of crafts (including crafts which have no conceivable relation to the project at hand) are requested by the contracting agency, furnished by the Department of Labor, and incorporated *in toto* in the contract.

The salient point is that the contractor must make his estimate of labor costs on the basis of his pre-bid investigation, and select what he believes to be the appropriate classification on the basis of the knowledge gained in the course of the investigation. The contract tells him only what rate must be applied if a particular classification is used; it does not specify what classifications are to be employed in accordance with local practice.

Hence it is the height of incongruity to compel a contractor to make his estimates of labor costs at his peril, and thereby absorb the liability of increased costs if his judgment is wrong, but to deprive him of

a forum to hear the evidence he has to support his appraisal. As it now stands in the light of the Court of Claims decision, the Disputes clause in the contract is deemed inapplicable to a type of dispute which occurs frequently and which may involve substantial cost to the contractor. Yet a dispute over proper classifications no less than one over material specifications, is a factual issue properly cognizable under the Disputes clause. Inasmuch as the typical Disputes clause explicitly provides the right to be heard and to offer evidence with regard to any disputed question of fact, the deprivation of such rights solely because the dispute involves the cost of labor rather than other costs of performance seems an unwarranted and ill-advised exception.

Moreover, the singling out of classification questions as non-reviewable would appear to fly in the face of the Wunderlich Act (Pet. 113a), which provides that decisions by "the head of any department or agency" shall not be immune from review. In the absence of compelling proof of Congressional intent to deprive the contractor of review in classification matters, i.e., to qualify the Wunderlich Act, his right to present evidence on the record in support of his petition, and to secure review by a court, should not be undermined.

3. Not only the contractor, but in the long run the public itself, will be adversely affected by the Court of Claims holding. The public interest is best served, we submit, where competitive bidders can bid realistically on the basis of known conditions, and speculation and contingencies can be kept to a minimum. On that basis the cost of construction, and hence the contract price, can be kept at a realistic level consist-

ent with sound performance, the meeting of prevailing wage scales, and a reasonable profit to the contractor. Particularly where federally financed construction has reached so large a scale as it has today, there is a need to restrain inflationary tendencies in the bidding and price of construction. It is the public, the taxpayer, who benefits thereby.

Where the contractor is subject to contingencies wholly beyond his control, a measure of instability is added to the bidding procedures. Sensible bidding, in an area as subject to hazards of performance as construction, requires that the contractor take into account, and provide for, contingencies over which he has no control, or concerning which he has no voice. The prudent bidder, aware that the evidence of labor costs that he has gathered in his pre-bid investigation might well be valueless, must either assume for bidding purposes that the higher paid of two possible classifications will be utilized or in any event include some reserve for that contingency. Thus a chaotic element is injected into the bidding, with a resultant inflation of the bid price.

This is particularly unfortunate in that it should be unnecessary, and would be unnecessary if the contractor were at least assured that he would have the opportunity to present his views to the forum that would pass upon his obligation. Under the law of the case at bar, however, the contractor's liability can be resolved by an *ex parte* declaration on the part of the Department of Labor, which can exclusively and finally impose the classification that it, for reasons satisfactory to itself, selects.

CONCLUSION

In view of the importance of the issue raised in this case to government contractors and to the public, the AGC urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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February 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 900

NELLO L. TEER COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The brief of the United States in opposition to the petition for a writ of certiorari raises several points which require a reply.

The Government contends (Opp., p. 17, fn. 8)[1] that

[1] "Opp." references herein refer to Brief for the United States in Opposition.

an Armed Services Procurement Regulation, adopted in 1965, will prevent future occurrences of the situation which aggrieved the petitioner in this case. This recently adopted regulation will not accomplish such a purpose for two main reasons. First, the regulation applies only to the contracts entered into by the agencies of the Department of Defense. The same perils continue to exist in all of the contracts for federally financed or assisted projects entered into under the various statutory authorities cited at page 18 of the petition. This recent change in the procurement regulation also does not apply to the vast number of contracts of the General Services Administration, Department of the Interior, Veterans Administration, Federal Aviation Agency, National Aeronautics and Space Administration, Atomic Energy Commission, and the many other contracting agencies of the government which are not a part of the Department of Defense.

Secondly, the cited amendment to the Armed Services Regulation by its terms excludes from the scope of the Disputes clause only questions concerning the meaning and interpretation of classifications *contained* in the wage decision. It would have no application where, as here, the dispute concerns classifications and wages of workers which are *not* contained in the wage determination. (Opp., pp. 3-4)

The Government also considers as pertinent (Opp., p. 2) a regulation promulgated by the Secretary of Labor in 1964 (29 F.R. 8004) relating to practice before the Wage Appeals Board. It urges that adoption of that regulation (Opp., p. 16) tends to moot any question of the lack of administrative due process. To the contrary, this provision for review of classifi-

cation controversies by the Department of Labor board furnishes no guarantee that contractors will be afforded a right to be heard or present evidence, nor does it safeguard the contractor against arbitrary, capricious, grossly erroneous, or *ex parte* decisions. That regulation makes the granting of any review a matter of discretion, not of right, and carefully limits the decisions which may be reviewed to those which "involve significant sums of money, large groups of employees, or novel or unusual situations." The stated review criteria make clear that the Board is not intended to afford contractors any right to obtain a review of the classification questions which routinely arise in the course of the performance of any construction contract. Inasmuch as the regulations fail to provide a guarantee of administrative due process in any controversy, they are an ineffectual substitute for proceedings under the standard Disputes provisions of construction contracts.

In its statement of facts (Opp., p. 8) the Government blandly characterizes as a "gamble" petitioner's determination that power equipment operators had been omitted from the published specification. Yet counsel for the Government concede that the omission of the highway classification for power equipment operators was an error (Opp., p. 7, fn. 3). They shrug aside this vital concession with the remarkable statement that had petitioner's claim been presented it "could in all likelihood have been settled administratively." What they choose to ignore is that petitioner took the only action possible to assert this claim administratively, in that it prepared and submitted the requisite request for the approval of wage rates for this omitted classification (88a) in accordance with Paragraph SC 17 (b) of the contract (4a).

It was not any nonfeasance of the contractor, but rather the erroneous refusal of the contracting officer to approve the lower scale of wages for the power equipment operators—even though it conformed with the lower scale being paid to the other heavy and highway construction workers on the project—which gave rise to this action. The contracting officer, not the Secretary of Labor, is obligated under the contract to make sure that the wages paid by the contractor are in conformity with the listed rates. Such contractual authority is a necessary corollary to the statutory authority (invested in the contracting officer by Section 276a-1 of the Davis-Bacon Act) to terminate a contract in the event that he finds that the rate of wages required by the contract are not being paid. Since unquestionably this duty of enforcement is exclusively that of the contracting officer, it cannot be usurped by the Secretary of Labor.

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